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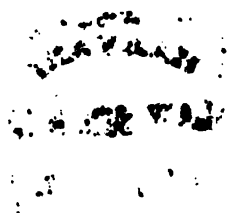
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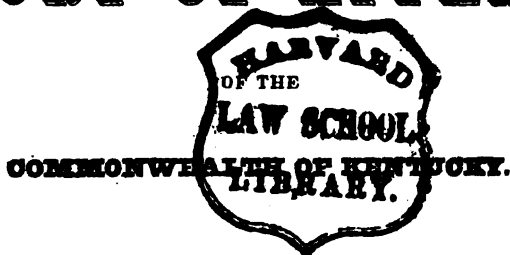
REPORTS

OF CASES

AT COMMON LAW AND IN EQUITY,

ARGUED AND DECIDED IN THE

COURT OF APPEALS



BY THOMAS B. MONROE,

REPORTER OF THE DECISIONS OF THE COURT OF APPEALS.

VOLUME VII.

COMMENCING WITH THE 14TH DAY OF APRIL, 1828, AND ENDING WITH THE
RESIGNATIONS OF CH. JUST. HISE AND JUDGES OWSLEY AND MILLS.

FRANKFORT:

PRINTED BY ALBERT G. HODGES.

1830.

Harvard
KF2
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v. 23

UNITED STATES OF AMERICA,

DISTRICT OF KENTUCKY, SCT.

BE IT REMEMBERED, that on this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and thirty, and in the fifty-fifth year of the independence of the United States, THOMAS B. MONROE, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author and proprietor, in the words and figures following, to-wit:

"Reports of cases at Common Law and in Equity, argued and decided in the Court of Appeals of the Commonwealth of Kentucky. By THOMAS B. MONROE, Reporter of the Decisions of the Court of Appeals. Volume VII. commencing with the 14th day of April, 1828, and ending with the resignations of chief justice Bibb, and judges Owsley and Mills."

In conformity to the act of the Congress of the United States, entitled "an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies during the times therein mentioned," and also to the act entitled "an act supplementary to the act entitled 'an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving and etching, historical and other prints."

JOHN H. HANNA,

Clerk of the District of Kentucky.

Rec. Sept. 14, 1839

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JUDGES OF THE GENERAL COURT.

Specially required by statute to attend at every Term and hold the Court:

JOHN L. BRIDGES.

HENRY PIRTLE.

All the other Circuit Judges are, also, members of the Court; but their attendance is not enforced. One Judge will constitute a court.

THE CIRCUIT JUDGES.

WILLIAM P. ROPER—*First District*—Mason, Fleming, Lewis, Bracken and Greenup.

HENRY O. BROWN—*Second District*—Harrison, Pendleton, Nicholas, Campbell, Boone and Grant.

THOMAS M. HICKEY—*Third District*—Fayette, Scott and Owen.

HENRY DAVIDGE—*Fourth District*—Franklin, Shelby, Henry, Gallatin, Oldham and Anderson.

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RICHARD FRENCH—*Tenth District*—Appointed March 3d, 1828, in the place of GEORGE SHANNON, resigned, Bourbon, Clarke, Madison and Estill.

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**THE
COURT OF APPEALS,
1828.**

**GEORGE M. BIBB, CHIEF JUSTICE OF KENTUCKY.
WILLIAM OWSLEY, }
BENJAMIN MILLS, } JUDGES.**

**JAMES W. DENNY, ATTORNEY GENERAL.
THOMAS B. MONROE, REPORTER.**

CASES
DETERMINED IN THE
Court of Appeals
OF KENTUCKY,

SPRING TERM, AFTER THE 13TH APRIL,
1828.

Hopkins' adm'r. vs. Morgan.

DEBT..

Error to the Muhlenburgh Circuit; ALNEY M'LEAN, Judge.

Case 1

Injunction bonds. Executors. Consideration.

Judge OWSLEY delivered the Opinion of the Court.

April 14.

CHARLES MORGAN, executor of Epps Littlepage, and John Morgan his surety, on 21st February, 1820, executed a bond, in which they acknowledged themselves indebted to John Hopkins in the penal sum of two hundred and thirty dollars, and bound themselves, their heirs &c. jointly and severally, to pay the same upon the following condition thereto subjoined: The condition of the above obligation is such, that whereas, the above bound Charles Morgan, executor as aforesaid, hath obtained an injunction staying all proceedings at law on a judgment and execution, obtained by said Hopkins against the said Morgan, executor aforesaid, in the Muhlenburgh circuit court, for \$112 05, besides interest and cost. Now if the said Morgan, executor as aforesaid, shall pay and satisfy the amount, and all sums of money, tobacco and costs, that may be awarded against him, in case said injunction shall be discharged or dissolved, then the above obligation to be void, else to remain in full force and virtue.

Injunction
bond of Mor-
gan's execu-
tor and his
security to
Hopkins, and
its condition.

HOPKINS'
ADM'R.
VS.
MORGAN.

Injunction
dissolved, and
action on the
bond.

Pleas of de-
fendant.

Plea No. 1.

The injunction was afterwards dissolved, and the administrator of Hopkins, he having departed this life, brought this action upon the bond, against John Morgan, the executor, Charles Morgan also being dead.

The defendant pleaded several pleas:—I. That the plaintiff, his action to have and maintain, ought not, because he says, that the said bond was executed without any legal, good or valuable consideration, in this, that the said Charles Morgan was executor of Epps Littlepage, and should not, by law, have been bound to answer the debt out of his own estate, and this he is ready to verify, &c.

Plea No. 2.

II. And for further plea the defendant says, the plaintiff his action ought not have and maintain, because he says, said bond was given for the purpose of obtaining an injunction from the Clerk's office, &c. against a judgment rendered against the said Charles Morgan, as executor of Epps Littlepage, and for no other consideration whatever; and the condition of the bond imposes greater obligations on the said Charles than the law, for that purpose, authorized and empowered the Clerk to impose, and more extensive than the order of the Justices, directing the same to be taken authorized, and so he says that the said bond is void in law, and was given for no good, legal, valid or valuable consideration whatever, &c.

Plea No. 3.

And for further plea, the defendant says, the plaintiff his action ought not to have and maintain, because he says, that the said Charles Morgan has fully administered all the estate of the said Epps Littlepage, deceased, and this he is ready to verify, &c.

Demurrers to
the pleas, sus-
tained by the
circuit court.

To each of these pleas the plaintiff filed a demurrer, and the demurrers were sustained by the court.

Plea No. 4.

The defendant then obtained leave of the court, and filed an additional plea in the following words: The defendant, for further plea in this behalf, says, the plaintiff his action ought not to have and maintain, because he says, that said bond was given for the purpose of obtaining an injunction from the

Clerk's office of this court, against a judgment rendered against the said Charles Morgan, as executor of Epps Littlepage to be levied of the estate, goods and chattels of the said Littlepage, in said Morgan's hands to be administered, and for no other or further consideration whatever; and the condition of said bond imposes greater obligations on the said Charles than the law, for that purpose authorized and empowered the Clerk to impose, and more extensive than the order of the Justices, directing the same to be taken, authorized; and so he says, that the said bond is void in law, and was given for no good, legal, valid or valuable consideration whatever, and this he is ready to verify, &c.

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To this plea, also, the plaintiff demurred, and the demurrer was overruled, and judgment rendered in bar of the action. To reverse that judgment this writ of error is prosecuted by the administrator of Hopkins.

Demurrers to fourth plea sustained and judgment in bar.

In reviewing the decisions of the circuit court, we deem it unnecessary to examine as to the description of bond required by law to be given by an executor, on obtaining an injunction against a judgment recovered against the estate of the testator in his hands to be administered. It is unnecessary, because neither of the pleas suggests any unfairness or artifice on the part of the Clerk in taking the bond, nor does either contain any averment going to shew that the import of the bond was not fully understood by the parties, or that it was executed through any mistaken conception whatever. We must, therefore, assume the fact to be, that with a knowledge of the import of the bond and condition, it was fairly and voluntarily executed by the executor and his surety, for the purpose of enjoining and suspending the execution of the judgment, which the intestate, Hopkins, had recovered against the executor, Morgan, in his fiduciary capacity, and whatever may be the description of bond which is required by law, to be given by executors, on obtaining an injunction against such judgments, there is no pretext for saying that the bond which was executed, is without any valuable consideration, and,

An injunction bond with conditions more burdensome on the obligors than required by law, or order of the court, is not void for that cause merely.

Query, of what is the proper condition of an injunction bond in case of an executor complainant?

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therefore, inoperative and void. Conceding, (and we make the concession without intending to decide the point,) that the bond does not in every particular conform to the requisitions of the act of assembly directing the execution of injunction bonds, still the delay which was produced by its execution in the proceedings on the judgment and execution of Hopkins, of itself, formed a valuable consideration to uphold the bond, as a common law obligation, and it has been repeatedly held by this court that injunction bonds, though not in strict conformity to the act of assembly upon the subject, will be sustained, if good, at common law.

In such case, if the bond in its terms binds the principal obligor personally, neither the addition of executor to his name, nor the character of the case will screen him from personal liability.

The foregoing remarks are a sufficient response to the two first and the last pleas, and go to shew that the court decided correctly, in sustaining the plaintiff's demurrer to the two first, but that the decision which overruled the demurrer to the last plea was erroneous. But it is proper to bestow a separate consideration on the third plea, which was adjudged bad by the court. The goodness of that plea turns upon the legal effect of the bond which was executed by Charles Morgan, the executor and his security, John Morgan, the defendant. If the bond imposes no personal obligation on the executor, and is construed to be nothing more than an undertaking in his character of executor, to pay, in legal course of administration of assets, the judgment of Hopkins, in case of a dissolution of the injunction; it may be contended that the third plea which alleges the assets which came to the hands of the executor, to have been fully administered, should have been sustained by the circuit court, as a valid plea. But according to any rule of interpretation known to us, we cannot admit that the bond imposes no personal obligation on the executor, Morgan, and his sureties. The executor, it is true, describes himself as such, but his undertaking is personal, expressly stipulating to pay the judgment &c. in case the injunction should be dissolved. The naming himself as executor is but a description of the person, and does not convert his undertaking into an obligation to pay out of the estate of the testator. The bond is the foundation of the action, and we

are incapable of discerning how, after the death of the executor, any action could be maintained upon the bond, against any administrator *de bonis non*, of the estate of Littlepage, that might be appointed. The third plea was, therefore, correctly adjudged bad.

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It was, however, erroneous to sustain the last plea, and render judgment in bar of the plaintiff's action; that plea we have already seen, contains no sufficient bar to the action. The judgment, must, therefore, in the opinion of a majority of the court, the Chief Justice dissenting, be reversed, with costs, the cause remanded to the court below, and such further proceedings there had, as may not be inconsistent with this opinion.

Fourth plea
also adjudged
ill.

The Chief Justice dissenting, delivered his own opinion, as follows:

CHARLES MORGAN, as the executor of Epps Littlepage, deceased, with John Morgan, his security, entered into an injunction bond, to John Hopkins, in consequence of an order of injunction obtained by Morgan to enjoin a judgment against the said executor Morgan—the bond bears date 21st February, 1820: the injunction was afterwards dissolved.

Hopkins sued upon this bond against Morgan, the surety, (the executor being dead,) and treated the bond as if it were an obligation by Charles Morgan personally, and in his individual character. Morgan pleaded several pleas, to which the demurrer of plaintiff was sustained; the defendant filed another plea, in substance alleging that the clerk had taken the bond binding Morgan, the executor, farther and beyond the requisition of law, and the order for injunction, and, therefore, it was void. To this the plaintiff likewise demurred, but the court sustained the plea and gave judgment for the defendant.

Although upon the last plea the judgment should not have been that it was a good plea, yet upon the whole record, I think the judgment for the defendant is correct. The bond upon its face is not the

Held the
bond did not
bind the ex-
ecutor per-
sonally, and

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that it was
erroneously
so declared
on.

personal and individual bond of Charles Morgan, as the declaration supposes and declares. It is a bond by Morgan, the executor, in his fiduciary character; the penalty is so; the condition recites the whole cause of entering into the bond, recites the judgment against the executor, and the order for the injunction, and then concludes, that if said Morgan, as executor, shall pay and satisfy such sums of money, costs, &c. as shall be awarded against him, in case the injunction should be discharged and dissolved, then the obligation to be void. The declaration in treating this bond, not as a bond by the executor, in his fiduciary character, but as the personal obligation of Morgan, the executor, I think is wrong; so that the declaration attempts to convert the bond into what it is not, and assigns the breach of the condition insufficiently.

Plea of fully
administered
held suffi-
cient.

The plea that Morgan, the executor, had fully administered all the estate of the said Epps Littlepage deceased, to which the plaintiff demurred, is a proper defence to the bond, in my opinion.

I am for affirming the judgment, because right, on the demurrer, although not for the reasons given by the circuit court.

Mayes, for plaintiff; *Triplett*, for defendant.

CHANCERY

Grayson vs. Lilly and Bullock.

Case 2.

Appeal from the Jefferson Circuit; JOHN P. OLDHAM, Judge.

Executions. Error. Restitution. Sheriff's Sales. Constitutional law. Debtor and Creditor. Equity. Costs.

April 14.

Judge MILLS delivered the Opinion of the Court.

Judgment for
Grayson
against Bul-
lock.

GRAYSON, the appellant, recovered judgment against John Bullock, in covenant, and issued his first execution, dated the 9th of November, 1819.

Sale of Bul-
lock's land to
Lilly, under
the execution

By virtue of that execution, the land of Bullock was sold, and Thomas Lilly became the purchaser, on a credit of one year, and executed bond with security accordingly.

But after execution issued on said bond, Lilly with his security, moved the court below to quash the bond, relying on the ground that the law which authorized and directed the sale on that length of credit was unconstitutional, and the court sustained the motion and quashed the bond.

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BULLOCK.
Sale quashed.

Grayson then issued another execution on his judgment. But at that time the Bank of the Commonwealth was created, and the act had passed which subjected his judgment to a stay of two years, unless he would endorse on his execution a willingness to accept, at par, the paper of the bank of the Commonwealth, then greatly depreciated. He submitted to that act, made the endorsement, and Bullock replevied the debt for three months. At the end of three months the amount of this replevin bond was collected in paper of the bank of the Commonwealth.

Grayson endorses for Commonwealth's paper, and it is replevied accordingly and paid in paper.

Grayson then prosecuted his writ of error in this court, to reverse the judgment of the court below between himself and Lilly, quashing the sale bond first given by Lilly, on the purchase of Bullock's bond.

Judgment quashing the sale bond reversed.

On hearing, this court reversed that judgment and reinstated the sale bond given by Lilly as valid.

On the return of the mandate of this court to the court below, Grayson issued his execution on said sale bond against Lilly and his surety, for the amount.

To enjoin this execution Lilly prosecuted this bill in equity, making both Grayson and Bullock defendants, relying on the foregoing facts, and alleging that, on his purchase of the land of Bullock, he had executed to Bullock a writing, agreeing to reconvey the land to Bullock, if Bullock refunded his money in one year, and if he did not, that the land was to be sold, and the sale bond to Grayson paid, and the residue, if any, was to go to Bullock. He insists that as Bullock has since paid the judgment under which the land was sold, that payment enures to his benefit, and that Bullock is willing that it.

Bill by Lilly for injunction against executions on the reinstated sale bond.

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vs.
LILLY AND
BULLOCK.

Grayson's
answer.

shall do so, and extinguish the sale bond, and he, therefore, prays a perpetual injunction.

Grayson admits that after the sale bond was quashed he pursued his judgment against Bullock, and was compelled to endorse a willingness to take paper, then depreciated nearly one half, and that he prosecuted the writ of error to save himself from this great loss; that on reversing the judgment and reinstating the sale bond he became bound to account for and pay back to Bullock the amount of Commonwealth's paper which he had received. He denies any knowledge of a friendly arrangement or purchase of the land for Bullock, as stated in the bill, or that he has any knowledge that Bullock is willing that the amount of notes on the bank of the Commonwealth which he had recovered from him on his original judgment, may be set off against, or placed to the credit of Lilly, on the sale bond, and insists that he has not a right himself to give such a credit, while Bullock holds his right of restoration of the paper currency. But declares his willingness to give credit for that paper, if Bullock is willing, at its real value in silver, and not at par. He also insists that as his judgment, which sounded in damages obtained in an action of covenant, did not bear interest till the sale to Lilly, he ought to be allowed the interest from the date of the sale bond, and also the sheriff's commission for making the sale, which was something considerable and was included in the sale bond.

No answer by
Bullock.

Bullock made no answer to the bill.

Decree of the
circuit court.

On hearing, the court below decreed a perpetual injunction to the whole sale bond, except the interest accruing thereon from its date to the date of the replevin bond given by Bullock in discharge of the execution on the judgment, issued after the sale bond was quashed, and also gave to Lilly his costs. From this decree Grayson has appealed to this court.

Sheriff's com-
mission al-
lowed as a
credit.

If we admit that the court below has assumed the correct criterion of settling this controversy, we cannot perceive how the sheriff's commission for making the sale could be refused to the appellant.

APRIL, 1898.

The sale was conducted fairly, and was held by this court to be valid, and was invalidated without the fault and against the consent of Grayson, by the wrongful act of Lilly, in attacking the sale, and as Grayson was bound to the sheriff, Lilly ought to account to Grayson for the commission. For it is evident that the subsequent discharge of the original judgment by Bullock did not include or discharge this commission on the sale rightly prosecuted by Grayson.

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BULLOCK.

But the main question is, what credit ought to be given on the sale bond, for the paper of the bank of the Commonwealth, received by Grayson on his executions against Bullock? Ought that paper to be credited at par, or according to the scale of depreciation, as the proof is clear that the depreciation was great, and Grayson insists that he is entitled to the difference between it and specie, and that the injunction ought to be dissolved to that amount. We take it for granted that some credit ought to be given, because Bullock by not answering the bill, has given his tacit assent to it, and Grayson has assented if Bullock does. But without the assent of Bullock, it is evident that the credit could not be given, unless under some special circumstances such as the insolvency and non-residence of Bullock or the like, none of which are pretended. For if we suppose Lilly and Bullock to be at variance, what would have been the course that each could take by law, on the reversal of the judgment quashing the sale bond? Bullock might have set aside all the executions against him, and have procured restitution of what he had paid, and Lilly was bound to pay up for the land, and to keep it for his remuneration, so that Lilly would have been entitled to the land—Grayson to its price, and Bullock to a restoration of the value of his bank paper, and it is only in consequence of the friendly agreement between Bullock and Lilly when the sale was made, converting the sale virtually into a mortgage, and Grayson's subsequent assent thereto in his answer, that any credit can be given. For to this agreement, at its date and even since, Grayson appears to be an entire stranger. He was not party or privy and did

Where, on the quashing a sale of land under execution, made on a credit, the plaintiff takes an execution on his original judgment, & endorses it for Bank paper, and collects that depreciated one half and afterwards the the judgment quashing the sale and sale bond is reversed, the plaintiff may proceed on the sale bond for specie, the defendant may have restitution of the value of the Bank paper, and the purchaser shall hold the land.

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BULLOCK.

not even know of its existence. He denies any knowledge of it, and none is proved.

But with his assent to the credit *sub modo*, insisting upon the credit only at its real value as the court shall adjudge, we are brought to the question what the credit ought to be; whether a paper dollar for a silver dollar, or the paper dollar at its real value?

But if in such case defendant and purchaser concur, the value in specie, not dollar for dollar, of bank paper paid on the execution on the judgment may be credited on the execution on the sale bond, and the defendant retain his land.

By the sale, Lilly became the debtor to Grayson, and Bullock was discharged. On quashing that sale, Lilly was discharged and Bullock again became the debtor, and in that situation Grayson compelled him to pay up the nominal amount in paper. On the reversal of the judgment quashing the bond, Lilly again became the debtor, and of course entitled to the land, and Grayson became the debtor of Bullock to the value of the bank paper which he had received. Now, if we suppose the endorsement on an execution, where specie was due, that bank paper would be taken, to be a solemn contract between debtor and creditor, so full of merit as to be enforced in a court of conscience, we cannot perceive how the benefit of such a contract can be claimed by Lilly. It was not made with him, nor can he claim the benefit of it. It was made between Grayson and Bullock alone, and Bullock got the benefit of it, and now has a right to be remunerated for what he paid. Grayson never did make such a contract with Lilly, to take from him paper of the bank of the Commonwealth, in discharge of his bond, which he had given to Grayson for the land of Bullock, and he is, therefore, to him, under no such obligations. If Grayson, with his bond quashed, and having no other mode of proceeding to recover his demand, except against Bullock, said to him, "I will take depreciated paper at par," it does not follow that with his bond on Lilly restored to him, he is bound to say the same thing to Lilly, and make with him a like engagement.

Statute allowing a replevin of two years held to be unconstitutional.

But we are not prepared to admit that the endorsement on an execution, pursuant to the act, is a contract between debtor and creditor, which ought to be enforced in a court of conscience. The demand of Grayson here, was due on a contract, and

judgment was rendered for the amount thereof, before the act, subjecting creditors to a suspension of two years, unless they consented to accept paper on the bank of the Commonwealth, was in existence. The act, therefore, was in contravention of his constitutional rights, as held by this court, in the case of *Lapsley vs Brashear*, and *Blair &c. vs. Williams*, 4 Litt. Rep. 34—47; which decisions we still approve, especially as they have since virtually received the sanction of the Supreme Court of the nation, in the case of *Ogden vs Saunders*, 12 Wheat. 218.

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tutional as to all contracts made before the enactment, according to *Blair and Williams &c.*

What then did Grayson do when his bond was destroyed, and he was driven back to his original judgment against Bullock? Rather than run the risque and incur the delay and expense of litigating this question against Bullock, while his debt was perhaps still in jeopardy; he submitted to the hard terms of an unconstitutional act, and took from Bullock, a part only of his debt, which in the course of subsequent events, he is bound to restore, and yet it is decreed by the court below, that he shall still abide by these terms dictated to him, by an act which was inoperative and void. It might as well be contended that if he was now restoring the paper to Bullock, he should restore to him the nominal amount in specie, as that he should give credit for that amount to Lilly. Indeed he cannot be bound to give Lilly a greater credit than he is bound to restore to Bullock, and that is the real value of the paper which he got.

Endorsement that Bank notes would be received on the execution was not a contract between the parties and not obligatory as such on plaintiff.

Indeed if the act in question was strictly constitutional, it must be admitted that its terms were hard, and that the money in specie was really due to Grayson, and that he could take it with a clear conscience, the act notwithstanding, and that if he had by any means have got it, no court of conscience would draw back from him, the difference between specie and paper: so no court of conscience ought to take from him the legal advantage which he holds, as he is endeavouring to receive no more by it, than what he has a right to in conscience, according to the principles recognized by this court, in

Equity will not enjoin a party from using an advantage at law, fairly obtained, which he can retain with a good conscience.

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the case of *Salter and Stapp vs. Richardson*, 3 Mon. 204. That he has the advantage at law, cannot be denied. If he has not, this application ought not to have been made in a court of chancery, but in a court of law, which can see to the proper execution, and prevent abuses of its own process. But here no motion or proceeding in a court of law could avail the appellee. There the appellant has a valid sale bond for the whole demand in specie, on which he is entitled to execution, and he is attempting to recover no more by virtue thereof than conscience allows him to receive, and, therefore, a court of conscience ought not to withhold from him what conscience allows him to take. For no principle is better settled than that a court of equity will not take away a legal advantage, which can be held conscientiously.

If the relief laws were constitutional, yet they were unjust, and equity ought not to interpose to enforce against a party who had escaped them at law.

Let us then, for the sake of the argument, suppose that this system of interference between debtor and creditor, although it extends its smiles upon the debtor and frowns upon the creditor class of the community, without intending to relieve the whole, must of necessity, belong to the powers of a state government; and that the calamities incident to society, will, at some times imperiously demand it, although it relieves no calamity but that of debt, if calamity it can be called, and brings a calamity, at the same time, on all creditors. Let us admit that the legislature can pare down the honest debts of its citizens, a fourth, a half, or nineteen-twentieths, without regard to the interest of the creditor, because the necessities of society are supposed to require it, still it must be admitted that the eternal rules of right and wrong are the same, and the moral sense must say that the part of the debtor taken away by legislation still belongs, in conscience, to the creditor, and the claims of morality and conscience still bind the debtor to pay it, unless his conscience is conformed to the legislative standard, instead of those moral principles which exist in despite of all legislation. If so, is it right to apply to a court of conscience to enforce such laws, and ought the chancellor to lend himself to subvert the principles of conscience? Certainly not. He ought to

leave the debtor to gain the advantages of such laws if he could, and not to aid him when he loses his way, or by his decree to take away the conscientious claim of his adversary. Such laws, if valid, ought to be construed strictly, almost as much so as penal laws, and the conscientious power of the chancellor ought not to be called upon to enforce their provisions. For, however expedient or politic or constitutional they may be, they never can be just.

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It may be said that the endorsement and acceptance of the bank paper, was an accord and satisfaction of the judgment. If so, Lilly was no party to the accord or the satisfaction. He once, by the purchase of Bullock's land, had compelled Grayson to accept his sale bond, with security, in satisfaction of his judgment. This satisfaction he afterwards wrested from Grayson, against his consent, by his motion to quash, and left Grayson to get satisfaction as he could. Grayson, embarrassed with the imposing authority of an act of the legislature, and not of his own free consent, submitted to the rigid terms dictated by the act, rather than expend his debt in contesting its validity, and thus received a part, and but a part of his demand, not by consent, but by way of obedience to his government. Such an accord could not be enforced in a court of law, on common law principles. For voluntary accords alone are there enforced; much less ought it to be enforced by the solemn decree of the chancellor. It was not a matter of choice, but yielded to under a constraint bordering on duress, while equity, justice and good conscience dictated to him no such terms. If, on the hypothesis that the act was constitutional, it was an advantage which he must gain by mere law and not by equity; if an accord and satisfaction, not of his choice, but dictated to him by a superior power, and enforced upon him without escape, unless he expended his debt to resist it, are not proper subjects to be enforced by the chancellor in favor of a complainant, much stronger is the reason against such relief by the chancellor, when it is known by settled adjudication, that not only equity and conscience, but the written constitution of his country,

Endorsement of the execution that Bank paper would be received, and payment and receipt of the currency accordingly, not regarded as a valid accord and satisfaction in equity, because the consequence of the unjust impositions of the invalid Statute.

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BULLOCK.

Mandate.
Costs not allowed complainant in a bill for credits which he had not asked for before suit, and which he obtains but by consent.

shielded him from these hard terms, and that the act which dictated them was inoperative and void.

The court below, therefore, erred in enjoining the commission of the sheriff on the sale, and, also, in giving credit for a greater amount, on account of the bank paper paid by Bullock, than what said paper was really worth in specie, at the time it was paid, and for this reason a majority of the court, the Chief Justice dissenting, concur in reversing the decree, with costs, and issuing a mandate to the court below to enter a decree in conformity with this opinion, leaving the complainant below to pay the costs of the proceedings in that court, as no application was made to obtain this credit, till the bill was filed by either Lilly or Bullock, and no such credit could be given without Bullock's assent.

Chief Justice BIRB, not concurring with the majority of the court, delivered his own opinion.

I dissent from the opinion and decree of the court as pronounced in this cause.

I find by recurring to the transcript and decision of the suit in this court upon the writ of error by Grayson vs. Lilly, (and referred to in Grayson's answer,) these facts.

Statement of
the case.

In September, 1819, Grayson sued Bullock upon a covenant dated in March, 1818, for one thousand dollars, payable in any current bank notes, fourteen months after date, with a credit endorsed for one hundred and thirty three dollars thirty four cents: the verdict was for \$927 33, in damages. Execution issued on the 9th November, 1819, on this judgment; the *venditioni exponas* to sell the land, issued 16th February, 1820; both these executions, (as appears by the transcript in the writs of error, and by the copies filed in this chancery case,) were endorsed by the plaintiff, that he would accept notes of the bank of Kentucky or its branches, in payment. The sale bond by Lilly, for the purchase of Bullock's land under execution, bears date on the 9th of March, 1820. The execution on the sale bond issued on the 15th of March, 1821, endorsed

by the plaintiff, that notes on the bank of Kentucky or its branches, or notes on the bank of the Commonwealth, or its branches, would be received in payment. The motion to quash this sale bond was made by Lilly, on the 28th March, 1821, and the court at that term quashed the bond. To this judgment Grayson sued his writ error against Lilly, bearing teste on the 31st January, 1823; the summons was executed on Lilly, in March, 1823, and the case was decided in this court upon the 17th October, 1824, upon the authority of *Magre vs. Miller*, 1 Litt. Rep. 356.

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BULLOCK.

By the record in this cause it appears, that on the day of the sale of Bullock's land, Lilly, the purchaser, executed to Bullock an obligation, reciting the sale under Grayson's execution, and also under four others, and the purchase made by him, under those executions, and agreeing that if Bullock paid the said money for which the land was sold, within the year, the land should be Bullock's, if not so paid, then Lilly was to be at liberty to give up the land to sale under execution for the said debts, and the balance, if any, to be the property of said Bullock.

Agreement
between Bul-
lock and Lil-
ly.

After the sale bond given by Lilly and his surety was quashed, Grayson issued an execution on his original judgment, endorsed, that notes on the bank of Kentucky or its branches, or notes on the bank of the Commonwealth, or its branches, would be accepted in payment; this execution was put into the hands of the sheriff, on the 14th April, 1821, and satisfied by Bullock on the 12th May, 1821, in notes, agreeable to the endorsement of the execution, which were received by Grayson of the sheriff, as admitted in his answer. These notes were worth then eighty cents to the dollar, as appears by the depositions in the cause. Having thus received satisfaction of his original judgment, Grayson issued an execution against Lilly and Rogers on the sale bond, bearing teste on the 19th April, 1825, which is stayed by the injunction and is the cause of controversy in this case.

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BULLOCK.

Decree of the
circuit court

The court dissolved the injunction as to the interest on the money due by the sale bond, from its date to the time the money was made on the execution against Bullock, amounting to \$72 58, and gave damages on that sum of ten per cent and perpetuated the injunction for the residue.

Point of con-
troversy stat-
ed.

Grayson has not credited the execution with any thing, on account of his receipt from Bullock. Yet expresses a willingness to credit the paper so received with Bullock's assent, at its value when received, but claims the bond as a specie debt, to be lessened only by the value of the paper when paid by Bullock. This is now, under the effect of the proceedings and the decree, the real controversy. The interests of Lilly and Bullock are in unison, one and the same, and both contend that the sale bond is paid and extinguished by Bullock.

Dissent from
the doctrine
of the case of
Hear and
Williams and
Lapley and
Brashear.

That I do not assent to the positions taken in the opinion delivered in the case of Lapsley vs. Brashear, and Blair vs. Williams, I hardly need say: the principles asserted in the petition for a re-hearing, I believe to be correct, and that they will stand the test of time, and the scrutiny of reason. The legislative powers therein asserted, I believe to be inherent in every well organized government, inseparable from the Legislative department, and essential to the preservation and well being of society. The discreet exercise of such powers upon a proper emergency will be sustained; an indiscreet exercise of them upon an unfit or dubious occasion, will be repelled and corrected, by public sentiment operating through the medium of representation. However devoutly it is to be wished that the country may never experience a calamity which shall call for the exercise of those powers of legislation, yet looking at the nature of man, his condition here, and judging from history and experience, and all the ills which flesh is heir to, it is not to be expected that future generations in all time to come, will enjoy, here on earth, an uninterrupted progression of peace, prosperity and happiness. I have no inclination to revive the discussion of the principles involved in those cases, but to avoid the dis-

cussion, as far as is consistent with my duty, is my earnest desire, as I have said on a former occasion. My opinion in this case being formed upon reasons wholly distinct from the decisions of *Lapsley vs. Brashear and Blair vs. Williams*, I have said only so much as appeared to my mind, to be necessary and proper to avoid any implied acquiescence, and called for by the quotation in the opinion of the majority of the court.

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vs.
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BULLOCK.

To the doctrine quoted from the case of *Salter and Stapp vs. Richardson*, I do not assent.

Dissent from
the case of
*Salter and
Stapp*.

With these exclusions of a conclusion in futuro, I proceed to explain the reasons by which my mind is led to the conclusion that the decree of the circuit court is more favorable to Grayson than it should have been, and, consequently, ought not to be reversed, on his complaint and assignment of errors.

The judgment against Bullock and execution thereon, the sale of Bullock's land thereby, and the bond of Lilly the purchaser, are all inseparably connected. The sale bond given by Lilly is founded on the execution, and that is founded on the judgment. The executions against Bullock of *feri facias* and *venditioni exponas*, the sale bond given by Lilly, the purchaser, and execution on that sale bond are all concentered and inseparably connected: they are all one mass of process to the execution of the judgment against Bullock: they are emanations from the judgment. If by the reversal of the original judgment, before payment of the sale bond and receiving a deed, the title of the purchaser was not vacated, yet upon such reversal the money for which the property sold would belong to defendant in execution, the right of Grayson to have the money on the sale bond, would be gone, and the defendant, Bullock, would be entitled to have it, not Grayson. So if Grayson accepts from Bullock satisfaction of the original judgment, Grayson's right to the money from Lilly is gone, and Bullock's right to have it of Lilly is complete. Grayson cannot receive satisfaction of his judgment of Bullock, and after having obtained that, claim to have the money.

When the purchaser obtains the sale of the land, and his bond given for the money to be quashed, the defendant becomes again the debtor; if he then satisfy the execution, issued by plaintiff on the original judgment, endorsed for Bank paper, and the sale and bond are afterwards restored, he, the original defendant, becomes entitled to the bond and the purchaser holds the land.

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ney from Lilly for Bullock's land: By the sale, Lilly became the debtor to Grayson, and Bullock was discharged. On quashing that sale Lilly was discharged, (so long as that judgment quashing the sale and sale bond remained unreversed,) and Bullock again became the debtor. In that condition and relationship of creditor and debtor when subsisting between Grayson and Bullock, Grayson issued his execution against Bullock, endorsed by an agreement to receive Bank notes, put into the hands of the sheriff who did collect it of Bullock on the 10th day of May, 1821, and paid it over to Grayson who accepted it. By this Grayson's judgment was discharged and satisfied by Bullock. By virtue of this and by his writing from Lilly, Bullock, in equity and in good conscience, was entitled to have the land which had been sold to satisfy that judgment; and Grayson had no farther claim on his judgment. But whether this satisfaction was accepted in bank notes, under par, or in horses, or cattle, or other property at high valuation, is wholly immaterial in my judgment—it was Grayson's own act; he did accept the satisfaction of his judgment. The after prosecution of the writ of error in 1823, and the reversal of the judgment quashing the sale bond could not make Bullock the debtor of Grayson, nor affect Bullock's right to have his land back from Lilly. Can Bullock recover back the bank notes he paid to the sheriff in May, 1821, and which Grayson received? It was paid by Bullock, then the debtor, and received and accepted by Grayson, then the creditor of Bullock.

If the plaintiff in such case attempt to proceed on the sale bond, equity ought to restrain him.

I am at a loss to conceive by what form of action or mode of proceeding Bullock can recover back from Grayson the bank notes. Between Grayson and Bullock the judgment was settled by execution, satisfied and accepted by Grayson. Lilly is the man who would have been entitled to recover back his money of Grayson, if not knowing of the previous satisfaction by Bullock, Lilly had paid Grayson. But knowing of the satisfaction of the judgment so accepted by Grayson, Lilly has properly come into a court of equity to restrain Grayson from coercing payment of that which Grayson is wrong-

fully endeavouring to collect from him; and the decree of the court ought to have gone, as I think, farther to relieve Lilly than it has gone: Grayson was not entitled to the interest which was decreed him. After accepting satisfaction of his judgment, I think Grayson was not at liberty to meddle with the sale and sale bond; it was Bullock's in equity, and Grayson ought to be restrained from proceeding on the sale bond against Lilly. Near two years after he received payment from Bullock, Grayson prosecuted his writ of error against Lilly. By the reversal he has recovered costs in this court and in the court below, these costs are not included in the amount of the sale bond, and are not involved in this controversy, and, therefore, I say nothing as to Lilly's right to them. If Grayson had desired to continue Lilly as his debtor instead of Bullock, and to prosecute his writ of error, he ought not to have proceeded on his original judgment, he ought not to have accumulated the costs and sheriff's commissions on that judgment, he ought not to have accepted satisfaction of that judgment.

I think Bullock and not Grayson is entitled to the benefit of the sale bond, and that by virtue of the satisfaction of the judgment by Bullock, and of the writing between Bullock and Lilly, the bond is satisfied and extinguished as between them; and if the circuit court had decreed an injunction against the whole it would have conformed to my opinion of the justice and equity of the case.

GRAYSON
vs.
LILLY AND
BULLOCK.

Purchaser
of the land
and defend-
ant having
originally
agreed the
payment by
defendant of
the sale bond
should annul
the sale, its
payment by
defendant
discharges
the judgment
and vacates
the sale.

Denny, for appellant; *Talbot*, for appellees.

Morrison's ex'or. vs. Rodes.

Error to the Fayette Circuit; JESSE BLEDSOE, Judge.

MOTION.

Case 3.

Wills. Clerk's fees. Statutes.

Judge OWSLEY delivered the Opinion of the Court.

April 15.

THE executor of Morrison caused to be printed several copies of the last will and testament of the testator, and presented eight of them

Case stated.

MORRISON'S
EX'OR.
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RODES.

to Rodes, who is the clerk of the Fayette county court, in which the will was recorded, to be certified by him according to law. The copies were received by Rodes, examined, corrected and certified in due form of law, and then handed over to the executor.

For this service Rodes charged the executor two cents for every twenty words contained in the copies, and issued his fee bill accordingly. Conceiving that he was not bound to pay, and that Rodes had no right to charge for the copies, though certified by him, the executor moved the circuit court of Fayette county to quash the fee bill.

The court was, however, of opinion, that the charge for the copies was correctly made by Rodes and overruled the motion of the executor.

To reverse that decision this writ of error is prosecuted.

The correctness of the decision turns upon the construction to be given to the act of assembly regulating clerk's fees. That part of the act under which the charge was made by Rodes, is in the following words:

Act fixing the fees of the county court clerks for copies of Wills, &c.

"The clerks of the county courts are entitled to the following fees for those services, which exclusively belong to their office, to-wit: For recording a will, or inventory, or appraisement, settlements with executors, or administrators, or guardians, or for *certified copies* thereof, for every twenty words 2 cents."

Were this the only provision of the act, having any bearing on the charge made by Rodes, there could, we apprehend, be no serious doubt as to the correctness of the decision of the circuit court. For though printed, after being examined, corrected and certified by Rodes, the copies of the will were *certified copies*, for which the provisions of the act cited expressly allows the clerk two cents for every twenty words, the precise amount charged by Rodes in the fee bill.

But there are other provisions in the act which forbid clerks charging for services not actually ren-

dered, and as the copies for which the charge was made by Rodes, was not actually written by him, but were furnished by the executor, it is contended that the charge for the copies is illegal, and that the fee bill ought, therefore, to have been quashed. It should, however, be recollected that by the express letter of the act to which we first referred, the fee of two cents for every twenty words, is allowed to the clerk for *certified copies*, so that the service for which the fee is given must be understood as actually rendered by the clerk, whenever the copy is duly certified by him, though the copy be not in fact made out by him. If the copy be furnished by others to the clerk, it has to be compared with the original, examined, and if inaccurate, corrected by him, before a certificate can, in due form, be given by the clerk. The copy must, therefore, by the very act of certifying it, though it be not written by him, be approved and adopted by the clerk as his own act, whereby is imposed upon the clerk the same liabilities for imperfections or inaccuracies in the copy, as if it had been actually written by him, and is conferring upon the clerk the undoubted right to have for the copy, the fee allowed by the act for a *certified copy*.

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—
tled to the same fee for examining and certifying printed copies of a Will furnished by the party applying for the attestation, as for manuscripts made by himself.

A majority of the court, Judge Mills dissenting, are, therefore, of opinion that the decision of the court overruling the motion to quash the fee bill, must be affirmed, with cost.

Dissent of Judge MILLS.

THE court is directed to quash every fee bill issued for services "*not actually rendered*." These words are used in opposition to services legally rendered, or those which might be plausibly made by construction of law. Fee bills for constructive services, not rendered in fact, was the evil which the legislature intended to remedy, and on which the act inflicts a penalty. This fee bill is one of that character. It is a constructive right—a legal claim—and one for which the services were never *actually rendered*; I, therefore, do not feel myself authorized to sanction it by construction; and conceive

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that fee bills, where the services were not rendered in fact, cannot be recovered.

Crittenden and Wickliffe, for plaintiffs; Chinn, Haggin and Loughborough, for defendants.

CHANCERY.

Sharp vs. Trustees of Lexington.

Case 4.

Appeal from the Fayette Circuit; JESSE BLEDSOE, Judge.

Village settlers. Minors. Statutes. Trustees of towns.

April 16.

Judge MILLS delivered the Opinion of the Court.

Sharp's bill
against the
Trustees of
Lexington to
recover two
lots, on the
claim of an
original set-
tler in the
town.

THIS is a bill filed by Richard Sharp against the trustees of Lexington, claiming that he was a settler in the town in the year 1781, and continued there till 1783, and that he was, of course entitled to an in and an out lot in the town, pursuant to a written agreement between the settlers, and the act of assembly, which passed subsequently, relative to that settlement; being the same which are recited and explained in the case of the Trustees of Lexington vs. Linsey's heirs, 2 Marsh. 443; to which reference is made for a more clear understanding of this. He alleges that on the 30th of September, 1782, the Trustees recognized his right, and by an order on their minutes, assigned to him, as a settler, in lot No. 49. That afterwards on the 12th of December, 1782, in violation of the law and power of said Trustees and his rights, they again caused an entry to be made, adjudging that his in lot No. 49 should be forfeited, and also his out lot No. 49. That the trustees not only had not the power to make such a forfeiture, but he was not present, and the entry was mistaken in alluding to out lot No. 49, as there was no such number attached to an out lot in the town; that they afterwards assigned and conveyed his in lot No. 49 to another, under whom it has been held ever since. He states that there is now only one in lot and one out lot left unappropriated, which he prays may be assigned and conveyed to him. In short, his claim, as set out, is similar, in many respects to the one set out by Lindsey's heirs, in the case before cited; with this excep-

tion, he does not pretend that he ever signed the original agreement among the settlers for the division of the territory, as the remote ancestor of Lindsey's heirs had done.

**SHARP
VS.
TRUSTEES OF
LEXINGTON.**

The trustees rely upon various grounds to defeat his claim; and among the rest that the complainant was not entitled to a lot, according to either the terms of the writing among the settlers, or the act of assembly directing the appropriation of the town lands, because he came there a minor, under the control of, and belonging to the family of his father, and with him left the town, and ever since resided in the county. They also rely upon lapse of time.

**Answer of the
Trustees.**

The court below dismissed his bill and he has appealed.

**Bill dismissed
by the circuit
court.**

It is clear both from the evidence and admission of the parties, that Sharp, the appellant, when he came to Lexington, was brought there with the family of his father, and so continued till his father moved away, in the commencement of 1783; that he was of the age of fourteen years when he came, and about seventeen when his father removed from town.

**Complain-
ant an infant
whilst resi-
dent in Lex-
ington.**

We are satisfied, from an inspection of the written agreement among the settlers, even if the appellant could be considered a party thereto, and also of the act of assembly, that such a minor did not come within the terms of either, and was not provided for thereby. The very making of the instrument of writing supposes that the parties were able to contract. It purports to be between the inhabitants—directs the expense of surveying to be borne by the inhabitants, and of course includes those able to pay. It speaks also of the settlers, who had cleared fields previously, and allowed them to clear adjoining for three years. It also provides for the case of new settlers that may come and settle, and directs how they may clear and improve, and become entitled.

**Held, the
agreement
between the
original set-
tlers of Lex-
ington, did
not embrace
minors resi-
dent in the
families of
their parents.**

The act of 1779, 1 Litt. L. K. 396, which reserved the town grounds for the settlers, speaks of the

Act of 1779.

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allowing vil-
lage rights.

Act of 1782
granting the
land in Lex-
ington to
Trustees to be
appropriated
according to
the original
agreement
between the
settlers.

Minors in the
families of
their fathers
not entitled
under the act
of '82 to the
settlement
rights to lots
in Lexington;
only such
persons as
were able to
contract were
entitled.

Nor were mi-
nors in the
families of
the villagers
entitled to
the 400 acres
village rights
and 1000 acre
pre-emption
in the coun-
try.

settlement of "families," who might have settled in villages, under an agreement to divide the land between them. It reserves the land for the use and benefit of "said inhabitants," and then declares, that "there shall be allowed to every such family, in consideration of their settlement," without the villages as much land as other pre-emptions were entitled to.

The act of 1782, 3 Litt. L. K. 542, which first disposed of the lands in the town of Lexington, refers to the agreement among the settlers, and of the necessity of passing the titles to the settlers. It vests the tract in trustees and authorizes them to convey to those already settled on the lots, and prescribes the conditions which the settlers shall perform.

There is not in either of these instruments any provision for the minor children in a family, as well as the head of it; and if intended, it could not have been omitted and left to implication only. They designed to embrace those only who had the control of themselves, and who were capable of contracting for, improving, and residing upon lands. If each child was to be admitted by construction, it would apply with equal force to every age and each sex, without any limitation, and the fund would have been wholly insufficient, and would have been disposed of to those who added no strength to, but rather increased the weakness of the village. The whole was then designed to secure to heads of families a home for the whole family, on which they could support and provide for their children instead of receiving from government a provision for every child.

It might indeed be as plausibly contended that each child was a villager and entitled to a settlement of 400 acres without the village, and a pre-emption of 1000 adjoining, as that each should be entitled to a lot; and thus the lands of Kentucky could not have held out, when distributed in portions for children. Many fathers would have had as many settlements and pre-emptions under their control as they had children, and thus appropriate an immense territory.

The only claim then, which the appellant can set up, is the order of the Trustees recognizing his title to the in lot. He seems to insist that their once having admitted his title, ought to be conclusive against them, and they had no authority to forfeit it, or retract their determination.

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vs.
TRUSTEES OF
LEXINGTON.

The order made by the trustees, assigning to Sharp as a settler an in lot of the town, was not conclusive against them, but they had power to set it aside and refuse a conveyance, on the ground he had no right at first.

Although the Trustees might have had no power to declare lots forfeited, by imposing conditions not within the terms of the grant, it does not follow that if they acknowledged a claim through a mistaken construction of the law, they had no power afterwards to retract it. They were Trustees for the settlers, and also for the public, as they were to sell to others all the lots beyond what the settlers should take under their mutual agreement, and if they let in a man as a settler, who did not come within the description, they so far did an injury to either settlers or purchasers, or the inhabitants of the town. They were authorised to adjust and fix the boundaries of lots; but they are not constituted a tribunal to decide on the rights of settlers, whose decisions should be conclusive or final against those whom they represented or themselves. They were liable to be deceived by false representations, and if they assigned a lot through a mistaken belief of facts, they might afterwards resist the conveyance of the lot, and were not estopped to shew the truth of the case; and they have done so in the present case. They shew that the appellant had no original claim, and was not entitled to the allotment made to him, and the order of allotment cannot be held conclusive. They also show that their predecessors at an early period, within a few months after the allotment, questioned and retracted it. The last order or entry, it is true, used the term forfeited, but states no reason for the forfeiture, and does not recite any failure on his part to perform any conditions imposed upon him, and it is, therefore, as probable that it was because he did not possess the necessary qualifications of a settler, as for any other cause. He seems not to have contested this retraction of their grant at the time, or after he became twenty one years of age, which furnishes a presumption, that it was done on account of his not be-

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ing entitled to any lot originally. They afterwards allotted and conveyed this lot to another, but did not assign to the appellant another lot; which shews that they went on the ground that he was entitled to none at first. We cannot hold this first allotment to him conclusive or inviolable, and conceive the appellees ought to have been permitted to question his original claim on its merits, which they have done with success.

As the appellees have been successful in shewing that he had no title originally, it is unnecessary to go into the enquiry, whether the complainant has lost a right by lapse of time, when no such right exists.

The decree is affirmed, with costs.

Haggin and Loughborough, for appellant; *Humphreys*, for appellee.

CHANCERY.

Case 5.

Bowlin and wife vs. Pollock.

Error to the Fayette Circuit; **JESSE BLEDSOE**, Judge.

Devises. Wills. Patents. Statutes. Co-tenants. Land warrants. Entries. Surveys. Estoppel. Mistakes. Warranty.

April 16.

Judge **MILLS** delivered the Opinion of the Court.

POLLOCK, the appellee, resided on a tract of four hundred acres of land, in his own name, or as heir of his brother.

A large claim covered entirely his tract and farm, of which entry was in the following words and figures :

“ *March 2d, 1784.*

Entry of Patty Harris and others. *Patty Harris and Thomas Spilman assignee, William Tapp and Elias Barbee assignee, John Suduth assignee, Steven Jett, John Porter, Benjamin Withers, Isaac Arnold, Spencer Graham, Jesse Smith, Thomas Massie, Jacob Nay and Charles Morgan assignees, enter 17372 acres of land on treasury warrants, Nos. 19,322, 18,877, 19,169, 18,880, 11,047, 19,186, 17,405, 18,874, 12,006 and 15,536,*

each to hold in proportion to their respective quantities in said warrants, beginning at the South West corner of Isaac Halbert's, Richard Ratcliff's, Henry and Robert Gunnell's, William Gunnell's and Chs. Morgan's entry of 12,311 acres, on Hinkson's fork, and running with their line North 1730 poles, thence West 1606, 65 poles, thence South 1730 poles, thence East 1606, 65 to the beginning."

BOWLIN AND
WIFE
VS.
POLLOCK.

The plat and certificate of survey, stands precisely in the same names with the entry, and was made 21st of April, 1785.

Survey in the
words of the
entry.

On the 14th May, 1795, a grant issued from the Commonwealth of Kentucky, on the aforesaid entry and survey, granting the lands positively, without saying in what proportions they should hold it, and the grant is to the following persons: "Unto Patty Harris and Thomas Spilman assignee of William Tapp and Elias Barbee assignee of John Suduth assignee of Stephen Jett, John Porter, Benjamin P. Withers, Isaac Arnold, Spencer Graham, Jesse Smith, Thomas Massie, John Coons assignees of Jacob Nay and Charles Morgan assignees &c."

Patent.

A suit in equity was brought on this entry in the name of H. Marshall, Esq. and others, against Pollock, to recover his land, he having the oldest patent.

Pending that controversy, and before it was finally closed, Pollock entered into a contract with Bowlin and wife, the appellants, to purchase of them part of the interest secured and granted by the aforesaid title papers to Thomas Spilman; she, the said Mrs. Bowlin, being the daughter of said Thomas Spilman, and supposed to be entitled, under the will of said Thomas, to his interest, devised by his will, to a part of his children, some of whom were dead, and she was their heir. The contract was evidenced by an article of agreement, dated 3d September, 1816, in which it is recited that, "whereas the said William Bowlin, in right of his wife, Sally Bowlin, late Sally Spilman, daughter of Thomas Spilman, one of the persons named in the entry of 17372 acres of land, made in Kentucky, on the 2d of March, 1784, in the name of Patty Harris &c. on

Contract between Pollock on the one part and Bowlin and wife on the other.

BOWLIN AND
WIFE.
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POLLOCK.

Hinkson's Fork, to one moiety of said Spilman's interest in said entry, which interest of said Bowlin and wife, is the one half of twenty-four hundred and forty-five acres in said entry, which has been surveyed and patented;" Pollock agreed to give two thousand dollars, the one half in one, and the other in two years from the date of the article; Bowlin and wife agreed to convey the land to Pollock as soon as *may be*, with a clause of special warranty against Thomas Spilman's heirs, and all persons claiming under him—Pollock to give his notes for the purchase money, and to mortgage the land to Bowlin, to secure its payment.

Conveyance
by Bowlin
and wife to
Pollock.

On the 9thth October, 1816, Bowlin and wife conveyed to Pollock, and Pollock gave his notes for the purchase money. The deed recites that "whereas, the said William Bowlin, in right of his said wife, Sally Bowlin, late Sally Spilman, daughter of Thomas Spilman, one of the persons named in an entry of 17372 acres of land, made in Kentucky on the second of March, 1784, in the name of Patty Harris & Co. on Hinkson's Fork, to one moiety of said Spilman's interest in said entry, which interest of said Bowlin and wife, is the one half of twenty-four hundred and forty-five acres in said entry, which has been surveyed and patented."

The conveyance then proceeds to convey "the said interest of the said Sally Bowlin and of said William Bowlin, in and to said land above described, being the one moiety or half of the interest of said Spilman, to wit, in the one half of twenty-four hundred and forty-five acres aforesaid in said entry, survey and patent." The deed also has a clause warranting the land so conveyed, against Bowlin and wife, and the claim of Thomas Spilman, and his heirs, and all persons claiming under him, but no others.

Pollock failed to pay his notes for the purchase money, when they became due; Bowlin obtained judgments at law, which Pollock enjoined by his bill in equity, praying a perpetual injunction and rescission of the contract. He amended his bill for the purchase money, twice, but we need not take notice of the equity of

his original bill or of one amendment, for it is done away by the answers or evidence in the cause, or on its own merits, was untenable.

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WIFE.
vs.
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But in one amendment he has set up an equity which merits more particular consideration. It is this, the will of Thomas Spilman, the father of Mrs Bowlin, was dated on the 1st of October, 1782, and was recorded, after his death, on the 7th of November, 1782, in King George county, Virginia, where he resided, in which the only clause which has a bearing on this controversy, is as follows :

and rescission
of the con-
tract.

“My desire is, whereas I have a land warrant for two thousand four hundred and forty-five acres of land, any where in Virginia, that it shall be equally divided between my four sons, viz: James Spilman, Thomas Spilman, John Spilman and Samuel Spilman. My saying any where in Virginia, is a mistake of mine: I mean the vacant land.” At the time of the contract and before a copy of this will was present, it was supposed and represented by all concerned, that the warrant mentioned in the will was the one on which Thomas Spilman's share in the entry was founded. Samuel Spilman and John Spilman, two of the devisees of the warrant, were only half brothers to the two other devisees, James and Thomas, and Mrs. Bowlin was their full sister, and the only remaining brother or sister of the whole blood; and the two first of these devisees had departed this life childless and intestate, and it was asserted by Bowlin and wife, that she inherited the shares of said deceased devisees, which was agreed to by Pollock, and under this impression and belief the contract was made.

Will of Spilman under which Pollock and his wife claimed.

But Pollock now charges in his bill that Charles Morgan had assigned the warrant alluded to in the will of Spilman, after his, said Spilman's death, to himself, or some other person had done so for him, and in his own name had appropriated the warrant by entry, survey and patent, and that the warrant devised by the will, is not included in the entry in the name of Patty Harris &c.; that Thomas Spilman had no interest in that entry, or if he had, it was not devised by his

Allegations of Pollock's amended bill, contending Bowlin and wife had nothing in the land they had sold him.

**BOWLIN AND
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will, but on his death descended to the oldest son, as heir at law, at the time of his death, who was William Spilman, and of course Mrs. Bowlin could not be, and was not entitled to one single foot of land, as heir to her brothers, who were the devisees of her father, and the whole claim of Patty Harris and others, an interest in which Bowlin and wife attempted to sell him, originated after the death of said Thomas Spilman, their father; and, therefore, the whole claim as to him was void, and there was no interest therein, either devisable or descendable to his offspring, and consequently that the whole contract was based either on an entire mistake of the parties, or the fraud of Bowlin and wife, and ought, therefore, to be rescinded in toto.

**Answer of
Bowlin and
wife.**

Bowlin and wife, in answers to these charges, deny any knowledge of Morgan's appropriation of the warrant named in the will of their father, and denies his authority to do so. They insist that the warrant devised by the will is included in the entry of Patty Harris & Co. and require proof to the contrary, and they refer to the will and title papers on this point. They still insist that Mrs. Bowlin holds the interest of her deceased brothers in the entry, by virtue of the devise of the warrant contained in the will of her father.

**Decree of the
circuit court
rescinding
the contract.**

The court below set aside the contract and granted a perpetual injunction, and from that decree Bowlin and wife have appealed.

**Spilman, the
testator,
owned no
warrant on
which the
claim was
founded, at
his death, but
they were all
issued and
the entry
made after
his death;
hence his
will passed
nothing in the**

It does appear from the Register's book of warrants, that the number of all the warrants in the entry of Patty Harris & Co. as above given are true. Not one of them is in the name of Thomas Spilman, and no assignment of any one is made to him, and every one issued after his death, except one small one of 362 acres, in the name of Thomas Porter, and assigned by him to John Porter, named in the entry, and issued 21st February, 1782; and another of 305 acres, issued the 15th of May, 1782, No. 12006, to Jesse Smith, named in the entry. So that Thomas Spilman, after all the warrants are ascertained, had no warrant, and the entry was made long after his death, in which he, with others, was to hold in pro-

portion to his warrant, when he had none, and was not in existence himself. The entry seems to say he is an assignee. The patent declares him assignee of William Tapp. From this statement it is placed beyond doubt that Thomas Spilman's will, made in 1782, could not and did not operate on this entry, made in 1784, on warrants issued after his death, even if his name had been in them. At that date his will could not pass lands acquired after its date and before his death, unless it was republished. Much less could it operate upon posthumous titles. Here one might rest this fact without further enquiry. For it is clear that Mrs. Bowlin could not have the least scintilla of title.

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WIFE
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land and his
devises took
nothing un-
der the grant.

But as it may be said that it would go to the heirs of Spilman, against whom Pollock has a warranty; on that Pollock ought to rely, instead of objecting to the contract. We will, therefore, pursue this enquiry further, and we will see that neither she nor the heir at law, could take any title. If the title was descendable it could be devised, and if it could be devised it would descend. The only plausible ground, therefore, on which it could be contended that the heirs could have any title, arises from the act of Assembly of the 22d December, 1792, 1 Litt. L. K. 160, which reads thus—

Query,
whether the
act of 1792
vests the heirs
or devisees,
of persons
dead before
the date of
the grants to
them, with
any title
where the de-
cedant had
not some in-
cipient claim
to the land
before his
death.

“And, whereas, in some instances grants have issued in the names of persons who were deceased, prior to the date of the grant, and cases of the same nature may happen in future: Be it enacted, that in all such cases the land conveyed shall descend to the heir, heirs or devisees in the same manner as it would do had the grant issued in the lifetime of such decedant.” If, for the sake of argument, it be conceded that this act vested in the heir the title, from the date of the entry, as far as it was competent for the Legislature to do so, although the decedant in his life, had no color of even an incipient claim (which is very problematical) the question will recur still, what interest did it vest?

To measure that interest we must look back at the entry and survey. These tell us the parties must hold in proportion to their respective war-

Grant to H.
S. assignee of
T., B assign-
ee, &c. &c.

**BOWLIN AND
WIFE.
vs.
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sued on a survey and entry, each to hold in proportion to their respective quantities in the warrants, if it be shewn S. had nothing in the warrant, nothing passed to him by the grant.

It seems the estoppel to patentees in such case, to deny that one of them had some interest, can have no effect in a controversy between him and his vendee about the title.

Sale of the devise of such patentee made under the mistake of both him and his vendee, as to his right shall be set aside on the discovery of the mistake, even after conveyance made.

Rescission of contracts for mistakes.

rants. To ascertain that, we seek the quantity of Thomas Spilman's warrant; and then we discover that he had no warrant at all. Whether the act ever could have intended to grant lands to an heir, where the ancestor had not the least shadow of claim to measure the grant by, is very doubtful. But without deciding it, we have no way to ascertain the extent of interest here.

It may be said that the joint holders of this entry would be estopped to question the right of Thos. Spilman's heirs. Be it so, the question still recurs, to what extent of interest are they estopped, is that interest is to be measured by his warrant, when he has none? But if an estoppel would lie, as between these patentees, would it lie as between them and strangers? The conclusion cannot be admitted.

It is evident, both from the proofs as well as the allegations of the parties that the appellants really believed that the warrant of Thomas Spilman was in this entry, and that his interest was to be measured thereby. The writings themselves shew that Bowlin and wife believed they were selling, and Pollock supposed he was buying, under the will, the warrant mentioned therein; an interest co-extensive with the inheritance of Mrs. Bowlin, from her deceased brothers of the whole blood. This turns out to be entirely untrue, the thing supposed to be bought and sold was not there, or any part of it. This was a clear mistake and no fraud is imputable to the parties. What then ought to be the effect of that mistake? The principle that the chancellor will vacate contracts on the ground of mistake, is too familiar to need either proof or illustration. The mistake here is not partial, nor does it affect a quantity of interest, but is so great that there is not a particle passed of that which was supposed to be sold.

It is doubted whether a case can be found in which the mistake was so palpable and of such extent, where the chancellor has refused to relieve. If there be, it was owing to the bad conduct of the applicant or to some other circumstance which forbade complete redress. Here there is no lacks, on

the part of Pollock, in seeking redress, so soon as he discovered his error. He has set up his equity by an amended bill so soon as it was discovered. He was ignorant of it when he filed the original, and his opponents seem to have been ignorant of it till the evidence disclosed it. He seems to have filed his original bill in search of equity and set up a colorable resistance to the contract which was unfounded; but this ought not to prejudice his better equity of a different character which he has asserted as soon as discovered, and there is no obstacle in the way of a complete rescission. The parties can be placed in *statu quo*, completely. Pollock has gotten nothing by his conveyance. By recovering the money his adversary may gain, and he may lose much. By preventing that recovery neither party will gain or lose any thing except the costs of the controversy.

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The only plausible ground on which it can be contended that Pollock ought not to be relieved, is, that he has the warranty of Bowlin against the heir or heirs of Spilman. That the controversy which might arise between the heir and devisees is one that was contemplated at the time, and provided against by the parties in the stipulations of the warranty, and that he ought to be compelled to rely upon it till he suffers an eviction. We have seen that he is in no great danger from the heir. But if in this we are mistaken and his warranty was general against the world, as the contract is not completed, the mistake so total and palpable, the principle is not perceived on which he should not be relieved. His motives in the purchase, no doubt, were to lay off the part of Thomas Spilman, around and covering his possession, including some adjoining land—to merge and unite that claim with his own, and thus place himself out of danger, not only of the entry of Patty Harris & Co. but to arm himself against other claimants, against whom he has no warranty, and against whom he has no weapon of defence. Allured by the representations of his adversaries, he firmly believed that he was acquiring an interest in the entry of Patty Harris and Co. to some extent, and was induced to take it without

It is no objection to the rescission of a contract on the ground of the mistake of the vendor in supposing he had some title when he had none, that a conveyance with warranty against certain persons who were also without right, had been executed.

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warranty, except as to those who claim under Spilman. As to others he was to run the risque. Let him be evicted when he may by others he loses all and has no recourse. He cannot probably be evicted by the heir of Spilman to give him the only recourse against his vendors. He cannot fortify his own claim, for he has added nothing to it.

Purchaser in such case having got nothing and not having paid the purchase money, may resist the payment, and have a rescission.

If the purchaser get any thing by a fair contract after the conveyance with warranty, he must look to that and not come into equity.

In short he has gotten nothing by the contract of the least benefit, except a simple warranty against the heirs of Spilman. He has to risque every body else, and was induced to do so by the mistaken and unintentional misrepresentation of facts by his vendor, and gains no defence for his home by his purchase. He has not completed it on his part and the opposite party can lose nothing if he never fulfils it.

If he had gotten a defective title by the contract, we admit that cases are not wanting to shew that he ought to rely on his warranty. But as he has not gotten even a colour or shadow of claim, he ought not to be compelled to rely on his warranty, in lieu of every thing besides.

The decree, the Chief Justice dissenting, must be affirmed with costs.

Dissent of Chief Justice BIBB.

THIS controversy grows out of a sale by Bowlin and wife, of an interest claimed by them in Thomas Spilman's part of the land in the following entry, survey and grant.

"March, 2d, 1784.

**Entry of Pat-
ty Harris &
Co.**

Patty Harris and Thomas Spilman, assignee, William Tapp and Elias Barbee, assignee, John Suduth, assignee, Stephen Jett, John Porter, Benjamin Withers, Isaac Arnold, Spencer Graham, Jesse Smith, Thomas Massie, Jacob Nay and Charles Morgan, assignees, enter 17372 acres of land, on treasury warrants, Nos. 19,322, 18,878, 19,169, 18,880, 11,047, 19,186, 17,466, 18,874, 12,006, and 15,536; each to hold in proportion to their respective quantities mentioned in said warrants, beginning at," &c.

Upon this entry a survey was executed on the 21st April, 1785, in the names of the persons described in the entry, and on the 14th May, 1795, a grant issued in consideration of the ten treasury warrants, by their numbers corresponding with the entry "unto Patty Harris and Thomas Spilman, assignee of William Tapp and Elias Barbee, assignee of John Sudduth, assignee of Stephen Jett, John Porter, Benjamin P. Withers, Isaac Arnold, Spencer Graham, Jesse Smith, Thomas Massie, John Coons, assignees of Jacob Nay and Charles Morgan, assignee, &c. a certain tract or parcel of land, containing 17,372 acres, by survey, bearing date the 21st day of April, 1785," after giving the description of the land, according to the certificate of survey, the grant of the Commonwealth is, "to have and to hold the said tract or parcel of land, with its appurtenances, to the said *Patty Harris and Company*, and their heirs forever: in witness whereof," &c.

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Grant to
Harris, Spil-
man, &c.

Upon this claim of *Patty Harris & Co.* a suit in chancery was instituted against Pollock and others, and a suit had been instituted likewise by Halbert and others, on the entry upon which *Harris & Co.* depended, against Fowler, and both of these suits coming up upon appeals, were heard together and decided on the 25th May, 1814, (as reported in 3rd Bibb, 384.) By this decision the entry of *Patty Harris & Co.* was sustained as a special location, the survey was declared to be conformable to entry, and the settlement and pre-emption of Pollock were declared vague, and, therefore, to yield to the claim of *Patty Harris & Co.* the complainants in that cause.

Suits between
Harris, Spil-
man, &c. and
Bowlin and
others.

On the third of October, 1816, by an article of agreement between Pollock and Bowlin, it was recited, "that, whereas the said William Bowlin, in right of his wife, Sally, late Sally Spilman, daughter of Thomas Spilman, one of the persons named in an entry of 17372 acres of land, made in Kentucky on the second of March, 1784, in the name of *Patty Harris & Co.* on Hinkson's Fork"—claimed a moiety of said Spilman's interest in the said

Articles of
agreement
between
Bowlin &c.
and Spilman.

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 entry, survey and grant; said Spilman's interest being twenty-four hundred and forty five acres, the half of which said Bowlin and wife claimed; therefore, in consideration of two thousand dollars, to be paid at the times and in equal payments as set forth in the agreement, by Pollock, Bowlin agreed to convey to Pollock his wife's interest, "with special warranty against the claim of said Thomas Spilman and his heirs, and all persons claiming under him"—and it was further agreed, that Pollock should give his two notes for one thousand dollars each, payable at the stipulated periods; that Bowlin and wife should convey their interest to Pollock, and that Pollock should execute at the same time a mortgage to secure the payment of the consideration.

Conveyance
 from Bowlin
 and wife to
 Pollock.

On the 7th of October, 1816, Bowlin and wife executed a deed to Pollock, reciting their claim as in the agreement of the third of October, and conveyed their interest as one moiety of twenty-four hundred and forty-five acres in said entry, survey and patent, with warranty against themselves and their heirs, "and against the claim of said Thomas Spilman and his heirs, and all persons claiming under him, but against no other person or claims whatever."

In May, 1818, Pollock exhibited his bill in equity against Bowlin and wife, for injunction against the judgment at law, obtained upon one of the notes given, and for a rescission of the contract.

Original bill
 of Pollock, for
 rescission of
 the contract.

In this bill Pollock states his claim and occupation under Pollock's settlement and pre-emption for about 25 or 26 years, and that he is yet possessed; that a suit was instituted against him and others by Patty Harris & Co. as complainants, of whom were Bowlin and wife, claiming as heirs of Thomas Spilman, upon the entry of Patty Harris & Co. and refers to the suit in the General court, as pending and undetermined—"that having understood from the record and proceedings in said suit, that said Bowlin and wife was the only heir at law of the said Thomas Spilman, as the record did then present the case, your orator and the said Bowlin and wife

came to an agreement for the one half of said Thos. Spilman's interest, being twelve hundred and twenty-two and an half acres," and refers to the agreement of the 3rd of October, and the deed of the 7th of October, 1816.

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The complaint in this bill is, that he discovered since the making of the agreement, that Bowlin and wife "are not the heirs at law of the said Thomas Spilman, and in fact their names have been stricken out, as part of the complainants in said suit in chancery, and others inserted in their place;" that the title to said Thomas Spilman's interest is now properly in the heirs of William Spilman, the eldest son of the said Thomas," &c. so that Bowlin and wife have no title to the land. He states in this bill that his possession was of 400 acres of land of the first quality, surveyed and patented to Alexander Pollock, which the complainant inherited as heir to his brother.

In August, 1818, Bowlin and wife filed their answer, in which they state that Thomas Spilman, the father of said Sally, now Sally Bowlin, being possessed of a warrant for two thousand five hundred and forty-five acres, devised it to his sons, James Spilman, Thomas Spilman, John Spilman and Samuel Spilman, as appears by his will recorded, which they exhibit; that John Spilman and Samuel Spilman were brothers of the whole blood, to said Sally; they, John, Samuel and Sally, being children of the last wife, and the only children of that marriage, and James and Thomas were the children of said testator by his former marriage; that John and Samuel, the brothers of the whole blood of said Sally, died intestate and without children, leaving said Sally, the only surviving sister and heiress, of the whole blood; that, believing themselves thereby entitled, they made the contract with Pollock; that he had been party to their suit; had, moreover, full knowledge of all the facts; that the will of said Thomas, the testator, was shewn to him, and the facts on which they founded their claim were fully made known, and were the subjects of frequent conversation by him, before he entered into

Answer of
Bowlin and
wife to Pol-
lock's origin-
al bill.

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the agreement and accepted the deed; they deny that the said Pollock had made the discovery pretended in his bill since the contract, but aver the facts were fully known and explained to him before the contract, and that he with a full knowledge of all the difficulties in their claim, entered into the agreement and accepted the warranty, and the deed therein mentioned; they aver that they had repeatedly before this suit offered to rescind the contract, but the complainant, Pollock, utterly refused, declaring that the contract was worth to him ten thousand dollars; they deny any knowledge of their names having been stricken out of the bill, and if done, it was wholly unauthorized by them.

Thomas
Spilman's
will.

The will of Thomas Spilman bears date on the first of October, 1782. The devise alluded to is in these words: "Item, my desire is, whereas, I have a land warrant for two thousand four hundred and forty-five acres of land, any where in Virginia, that it shall be equally divided between my four sons, viz: James Spilman, Thomas Spilman, John Spilman and Samuel Spilman—my saying any where in Virginia is a mistake of mine, I mean any vacant land." This will was duly admitted to record in Nov. 1782.

Proofs.

It appears by the depositions in the cause, that Pollock was fully apprised of the manner in which Bowlin and wife claimed; that they did truly represent the facts upon which she based her claim as heiress to her deceased brothers of the full blood, their death and intestacy, without issue, and furnished Pollock with a copy of the will of Thomas Spilman, deceased, and after inspecting it, he purchased upon his own judgment upon the facts, truly and fairly stated, as set forth in the answer of Bowlin and wife. It does moreover appear in proof that he declared that by the purchase of Bowlin and wife, he was fully able to cope with those who were suing him upon the claim of Patty Harris & Co.; that he refused the proposal of Bowlin to rescind the contract, upon some dissatisfaction expressed by Pollock, and said the contract was worth eight or

ten thousand dollars to him, but nothing to Bowlin and wife.

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WIFE

After the answer of Bowlin and wife was filed, and depositions taken fully supporting that answer, Pollock obtained leave in August, 1819, to file an amended bill.

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POLLOCK.
Amended bill

In this amendment he exhibits the will of Thomas Spilman, bearing date in 1782, and recorded in Virginia in the same year, and alleges that he has discovered the fact of the will and devise and death of Thomas Spilman in 1782, and it may be true that said Sally has inherited the part of the land warrant, devised in said will as set forth in the answer; but that he has "discovered that a certain Charles Morgan assigned the said warrant so devised, in the will of Spilman, to himself, after the death of Thomas Spilman, or some other person has done so for him, and has appropriated said warrant by entry, survey and patent as by a copy of the warrant, entry, survey and patent hereto annexed will appear; that the warrant so devised by said will is not included in the warrant of Patty Harris &c. as will appear by their numbers on the face of the entry and warrants hereto annexed; that if said Thomas Spilman had an interest in the entry sold to your orator, it was not devised by his will and under the law of descents then in force, his interest descended to his eldest son, at that time his heir at law, to-wit, William Spilman, as your orator has been informed and believes, and that the defendant, Sarah Bowlin, could not be entitled to one single foot of said warrant;" that as Thomas Spilman died before the date of the entry of Patty Harris &c. the entry as to him is void, and could vest no interest devisable or descendable by law, and, therefore, he insists that the defendant, Sarah, could have no interest of any kind in the claim of Patty Harris & Co.

The defendants in answer to his amended bill, deny any knowledge of the facts asserted, other or different from those asserted in their former answer.

Answer to
amended bill.

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The circuit court decreed that the contract be rescinded, and perpetuated the injunction against the judgment at law.

Decree of the circuit court.

The bill complains that Thomas Spilman, one of Patty Harris & Co. was dead before the date of the entry and grant in his name. This is true. But the statute of 1792, (1 Litt. laws, p. 160, 2 Dig. 1053,) provides for such cases thus:

Act of '92
vested the title in those who were heirs or devisees at the date of the enactment, and not at the time of the demise.

"Whereas, in some instances grants have issued in the names of persons who were deceased prior to the date, and cases of the same nature may happen in future: Be it enacted, that in all such cases, the land conveyed shall descend to the heir, heirs or devisees, in the same manner as it would do, had the grant issued in the lifetime of said decedant."

When the grant issued in 1795, to Patty Harris, Thomas Spilman and others, it was not a void grant to Spilman, but his heirs or his devisees took the estate in the same manner as if the grant had issued to Spilman in his lifetime. The cases of Hansford vs. Minor's heirs, 4 Bibb, 385, and Lewis vs McGee, 1 Marsh. 199-201, have settled the doctrine, that in such cases, of grants in the name of deceased persons, the statute does not give the land to the heirs or devisees, as known by the laws of devises and descents, existing at the date of the grant, but to the heirs or devisees, according to the law of descent and devise existing at the death of the deceased.

Death of the grantee before the entry does not affect the operation of the grant under the act of '92 for the benefit of the heirs and devisees.

The fact of the death of Thomas Spilman before the entry, may, it is true, diminish the power of the claim of Patty Harris & Co. to overreach and command conflicting claims, or produce difficulties in such conflicts.

Claim to relief set up in the original bill, denounced.

But that diminished authority cannot be any just cause of complaint against the contract between Pollock and Bowlin; because Pollock before he made the contract, was fully apprized of the death of Thomas Spilman, in 1782, before the date of the entry; the fact was fully disclosed to his view, by the inspection of the copy of the will, and by his knowledge of the entry, survey and patent of Patty

Harris & Co. acquired as a suitor contending against it; he purchased with a full knowledge of those facts; his first bill is an unfair, disingenuous pretence of an after discovery of that which was known to him before and at the time of the contract. He purchased with a full knowledge and statement of the facts, and, therefore, on this ground there is no cause for rescinding the agreement.

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By the amended bill he takes the ground, that it may be true that Sarah Bowlin did inherit from her two brothers, their parts of the land warrant devised to them, but that the land warrant so devised was not included in the entry of Patty Harris & Co.; that Charles Morgan had assigned the warrant to himself and acquired land thereby elsewhere; that Sarah Bowlin took nothing in the entry of Patty Harris & Co.; that Thomas Spilman had no interest in that entry descendible or devisable; that the interest, whatever it may be, of Thomas Spilman, under that entry, survey and patent is vested in the eldest son and heir at law, William Spilman.

Grounds in
in the amend-
ment.

A land warrant was a devisable and descendible interest, according to the case of Gist's heirs vs. Robinett &c., 3 Bibb, 5. The land after acquired by the warrant would pass to the devisees or to the heir at law, in case there was no devise. By virtue of the statute of 1792, before recited, the grant to Thomas Spilman, then dead, vested such interest as was designed for him in his devisees, or in his heir at law, according to the laws of devise and descent in 1782, when his will and testament bears date and when he died.

Land war-
warrants de-
visable and
descendible.

As the laws stood in 1782, a testator could not devise an after acquired interest in lands, and the eldest son was the heir at law. But a land warrant was devisable, and the bill admits that the testator had a warrant as alluded to in the will. If the interest conceded to Spilman in the entry and patent to Patty Harris & Co. was founded on the warrant alluded to in the will of Spilman, then the statute of 1792 vests and maintains the interest of the devisee of that warrant.

Devise of
land war-
rants in 1782,
passed the
land after-
wards appro-
priated by
them.

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Before the
act of '87 the
sister of the
whole blood
inherited the
entire estate
in exclusion
of the brother
of the half
blood.

If that warrant was one of the ten upon which the entry purports to be founded, and in consideration of which the grant issued, then it is clear that the interest of Spilman would pass by virtue of the statute of 1792, to the devisees, the four sons of Thomas Spilman. In that case the interest of Bowlin and wife would be what was supposed in the contract, that is to say, the two sons by the second marriage, John and Samuel, would have taken each one fourth by the devise, and by their subsequent death, without issue and intestate, Mrs. Sarah Bowlin, their surviving sister of the whole blood, would inherit their shares to the exclusion of the sons, William, James and Thomas, the sons of the first wife of Thomas Spilman, they being brothers of the half blood. According to the law of descents, before the first day of January, 1787, the collateral heir of the person last seized, must have been his next collateral kinsman, of the whole blood. So, upon the death of John and Samuel, children of the second marriage, the brothers, William, James and Thomas, sons of Thomas Spilman by his first marriage, could not inherit as heir to the brothers, John and Samuel, of the half blood, but their interest descended to Sarah Spilman, now Bowlin, the sister of the whole blood: for in such cases the maxim is, "*possessio fratris facit sororem esse hæc redem*" —the possession of the brother makes the sister the heir. Black. Com. book II, chap. 14—VI rule of descents, p. 227 and 231.

Question of
the interest of
Spilman in
the warrant.

The title of the sister, Sarah, to the shares of her two deceased brothers of the whole blood, John and Samuel, in the land warrant devised to the four sons, to be equally divided, (thereby being tenants in common,) is not denied. But the object of the amended bill is to prove that at the time of the making of the will, the testator had no devisable interest in the warrants, upon which the entry of Patty Harris & Co. was subsequently made, and upon which the grant issued, nor even any interest which could, or has descended, or been vested, in the heir at law

To maintain these propositions the complainant, by his bill, proposes to trace the ten warrants referred to by their numbers in the entry, survey and grant; to shew therefrom, that all those warrants issued subsequently to the death of Thomas Spilman; that no one issued to him; that no part of any one appears to have been assigned to him, and that the testator's warrant of 2445, was assigned by Charles Morgan to himself, and appropriated elsewhere. These facts asserted by the amended bill; are put in issue by the answer.

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The only evidence of the facts is the certificate of the Register, made an exhibit in the bill, in which the quantity of each warrant referred to in the entry, survey and grant of Patty Harris & Co. is given, the date of each warrant, to whom issued, and the assignments appearing thereon, and the quantities assigned and the persons appearing as assignees. If the facts stated in the certificate of the Register be taken as true, then the questions of law arising thereon remain to be investigated. But the competency of the certificate of the Register to prove the facts at issue arises. As an exhibit to explain the facts, this certificate is referred to in the bill, as such it has its place; the defendants were to notice the facts asserted by reference to it; they have put the facts in issue: no other proof is offered but that certificate. A copy of a public record or document would be evidence of all that the original itself would prove, if produced. But a certificate or extract of facts from parts of public records or documents belonging to the Register's office are not evidence. If such a certificate had been offered in evidence and not objected to, this court ought not to receive the objection, for the first time made here. They ought in such case to presume that the parties had accepted such certificate or extract, in lieu of the more expensive mode of bringing certified copies of the whole documents.

Held the certificate of the Register (not a certified copy of a record in his office) of the dates, amounts and assignments of the warrants on which the grant issued, is not competent evidence

But here the certificate is referred to in the bill, to the reading of it as part of the bill, no objection could be made, any more than to the reading of the body of the bill. But when read, it has not the

An exhibit made in the bill to prove a fact denied in the answer,

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may be read as part of pleading and as such cannot be excluded, but if not competent, will not be taken for proof, but for allegation only.

Land warrants were assignable by parol prior to 1787.

Spilman's interest appears on the face of the entry, survey and patent, but not the amount of it.

force of evidence to prove the truth of the bill. If the exhibit referred to, has all the solemnities necessary to authorize it to be read as evidence, as a certified copy of an entry, survey, patent, or warrant, or deed enrolled, then the reading of the exhibit proves the truth of it. But the reading of a certificate, such as the one in question, is no more evidence of the truth of the facts, than a copy of an account sworn to by the complainant, and referred to in his bill, would be evidence of the justice of the account when put in issue.

But the entry is in the name of Spilman, as an assignee; a warrant was assignable by parol before 1787; the surveyor has received the entry so, he has received the survey so, and the Register has issued the grant to Spilman, as being assignee; all the company have recognized Spilman as an assignee of the warrants or some part thereof, and as part owner of the entry, survey and grant. To receive a memorandum from the office, which will stop at any point or part, desired by the party asking it, to overturn the solemn acts of the Surveyor, Register and parties concerned in interest, would be going too far.

To obviate the internal evidence contained in the entry, survey and grant, that Spilman is assignee and entitled to a part of the land, the counsel for complainant lay stress on the expressions in the entry, "each to hold in proportion to their respective quantites mentioned in said warrants," and agree that as no warrant has issued to Spilman and no assignment appears on the warrants to him, that therefore he is entitled to none by the very terms of the entry. Supposing the certificate of the Register to be evidence, then the quantities expressed in the ten warrants amount to nineteen thousand six hundred and forty-one acres and an half, exceeding the quantity located by two thousand two hundred sixty-nine and three quarter acres. Of this quantity of 19641 1-2 acres, but eight of the fifteen persons named in the entry are original holders: Spilman, Barbee, Sudduth, John Porter, Nay and Morgan, are not named in the body of the warrants, and Coons, a

patentee, is not named in the entry or survey. Neither the *habendum* in the entry nor in the patent refer to persons named in the body of the warrants, as originally issued, nor to the quantities expressed in the warrants. Not to the persons alone named, because some of them are expressly named as assignees, and Spilman especially; not to the quantities expressed in the face of the warrants, because each warrant must abate so much as is necessary to reduce the quantities in the warrants to the quantity located; otherwise some one or more of the persons named in the entry would get none of the land located. This shews that these expressions in the entry, "each to hold in proportion to their respective quantities mentioned in said warrants," means that they are not joint tenants, but that their interests are unequal and subject to be settled among themselves.

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The entry, survey and grant, all express an interest in Thomas Spilman; the company are estopped to deny it; that interest, like the interest of each and every other, cannot be determined by the grant but must be determined by evidence behind the grant, survey and entry. If no more than the exact quantity of seventeen thousand three hundred and seventy-two acres shall be obtained, all must suffer a proportional abatement; in case of a defect all must sustain a farther proportional diminution, in case of surplus all must share it proportionally; according to their true interests in the entry, survey and grant.

Hold the other grantees are estopped to deny the interest of Spilman named in the entry, survey, and patent.

The respective interests of the grantees are matters of fact to be settled by the company, they are estopped to say Thomas Spilman had no interest, and that interest may be traced by matters without the entry, survey and grant. The bill admits that the testator, Spilman, had an interest in a warrant for 2445 acres of land, but alleges that warrant is not the one on which this entry, survey and grant was founded: first, because Charles Morgan, or some one for him, assigned that warrant to himself; secondly, because none of the ten warrants have issued or have been assigned to Spilman, as appears by the warrants. At the time of the devise, and at the

Amount of each patentee's interest subject to be fixed by evidence out of the title papers, and for this purpose assignments of warrants by parol made before '87 might be proved.

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date of the entry no statute required a contract for land to be in writing, the statute of frauds and perjuries was not then in force in Virginia. Suppose Charles Morgan did assign away the warrant of Thomas Spilman, and did agree, or in consideration of that justice due to Thomas Spilman or his devisees, did of his own accord design, to compensate for the loss of that warrant by the like quantity in this entry, survey and grant? Suppose the devisees of Spilman are willing to accept compensation from Morgan, by a like quantity in the entry? What is to prevent it? Morgan is, by the certificate filed, the assignee of three thousand nine hundred and sixty-eight and an half acres of those warrants, from other members of the company, and can, out of that quantity, compensate Spilman's devisees. The devisees have a right to trace their right in equity, and there is nothing in the face of the entry, survey grant, or in the certificate from the Register's office to estop them from so tracing their interest in the grant to Patty Harris & Co.; but there is much to fortify them in so doing. Whether the entry was made for Spilman upon the identical warrant alluded to in his will, or by Charles Morgan upon another warrant in exchange for that, is not material.

It is no objection to the claim of the heirs or devisees under the act of 1792, that the land warrants issued after the death of the ancestor, as between the heirs or devisees and a co-grantee.

But the bill supposes, that if the warrants mentioned in the entry of Patty Harris & Co. did not issue until after the death of Spilman, neither his devisees nor his heirs can have any interest; that by the certificate of the Register as to dates, persons to whom the warrants issued, and the assignments; that it is proved that Thomas Spilman had neither a descendable or devisable interest. The conclusion cannot be admitted. By the statute of 1792, the interest of Spilman in the grant issued in his name is cast upon the devisees, or upon the heir at law, in the same manner as it would be, had the grant issued in the lifetime of such decedant. Let us suppose then, that Thomas Spilman had been alive in 1795, when the grant issued to Patty Harris, Thos. Spilman & Co. it is clear that if the interest of Thomas Spilman did not pass by devise, it must after his death have passed to the heirs at law, of whom Mrs. Sarah Bowlin would have been one,

According to the law of descents in 1795. Or suppose that the grant, by force of the statute of 1792, has reference to the period of Thomas Spilman's death in 1782, so as to vest the estate immediately upon the issuing of the grant in 1795, in the same person or persons who were capable to take in 1782, by devise or descent, according to the laws then existing and applicable to the facts. Then if the devisees cannot trace the connexion between the warrant devised and the subsequent entry, survey and grant, so as to take as devisees, the interest granted by the patent to Thomas Spilman, then dead, must vest in his heir at law. The patent vests an interest either in the devisees or in the heir, which Patty Harris & Co. are estopped to deny: the death of Spilman, the locator, named in the entry, survey and grant, is not extinguished by his death, it is made effectual and valid by force of the statute.

BOWLIN AND
WIFE
VS.
POLLOCK.

If the estate granted to Thomas Spilman did pass by the devise of the warrant of 2445 acres, and the connexion between that warrant and the subsequent grant, then Mrs. Bowlin takes the precise interest which she claimed and sold, and her husband can never be responsible, as for breach of his warranty against the heir of Thomas Spilman. But if the heir shall claim and Bowlin and wife shall be unable to trace the connexion between the warrant devised, and the grant to Patty Harris, Thomas Spilman & Co. then the event will have happened, and the possibility to which the parties had an eye, and about which they contracted for a warranty; the defendant, Bowlin and wife, agreeing to make the warranty, and the complainant agreeing to accept it and rely upon it. When the complainant so consented, he knew that Spilman died in 1782, a copy of his will proved and admitted to record in that year was presented to him and he inspected it; he knew the facts by which Bowlin and wife claimed as heiress to the two deceased devisees of the unlocated land warrant; he knew by reason of the suit against him, by Patty Harris & Co. the date of the entry, the terms and contents of the entry and of the grant, he was holding a tract of land within the grant, he was party to a decree by Patty Harris,

Interest of
Bowlin and
wife in the
land.

Held the purchaser having taken the warranty in the conveyance, must rely on that and not dispute the claim he purchased.

**BOWLIN AND
WIFE
VS.
POLLOCK.**

Bowlin and wife &c. by which the validity of the claim of Patty Harris & Co. and the invalidity of his own was decreed; with his eyes open to the possible difficulty which might in future arise between the heir at law and the devisees of Thomas Spilman, deceased, Pollock purchased one moiety of the claim of the devisees from Bowlin and wife, the heiress of that moiety, from two of the deceased devisees, taking a covenant of warranty against the claim of the heir at law. As to every thing else except this covenant of warranty against the possible difficulty with the heir at law, it was a catching bargain on the part of Pollock, to protect his possession.

Contract
made by
Pollock with
full knowl-
edge.

This warranty was given and accepted upon fair open dealing, without fraud or concealment on the part of Bowlin and wife. Upon the facts stated it was brought to a question of devise or descent under the will of Thomas Spilman. A warranty against the heir at law is accepted. There is no pretence by any colour of proof for saying that the heir at law has set up any claim in opposition to the claim of Bowlin and wife. But the complainant has taken upon himself to stir the question and to prove that the title is in the heir at law. At best, allowing his exhibit of the memorandum from the Register its full force, it is matter of doubt between the title of the devisee and the title of the heir at law, and the scale of evidence inclines in favor of the devisee. He has not called Patty Harris & Co. into court to settle the interest of Spilman; nor upon Charles Morgan to say whether this interest of Thomas Spilman was given in exchange for another warrant alluded to in the will. But having put Bowlin and wife out of court, in the suit by Patty Harris & Co. against him, and thereby hedged himself against a new suit, he attempts to rescind the contract, by pleading the title of the heir at law, and so indirectly to open the decree, and to evade the stipulations of the contract with Bowlin.

Where the
contract is for

When parties have fairly stipulated with a view to a particular difficulty, and the vendor has agreed to warrant against it, and the vendee to accept the

warranty; a court of equity ought not to assist the purchaser in taking up the cudgels to perform the office of an adversary claimant, and in acting the part of a traitor to his title and to his warrantor.

BOWLIN AND
WIFE.
vs.
POLLOCK.

It is safer in the present case to leave the purchaser, Pollock, to his recourse upon the warranty, in case the heir at law shall ever successfully impeach the claim of Sally Bowlin under the devise. Whether the land entered, surveyed and patented in the name of Thomas Spilman, deceased, did or did not pass by the devise of the warrant mentioned in the will, depends upon tracing that warrant. It is a question between the heir at law and the representative of the devisees. The pretended discovery can do no more than raise the question between the title of the heir and the title of the devisees. The complainant accepted a covenant against the claim of the heir, if ever made good—the heir has never yet asserted a claim in opposition to that of the devisees.

and the purchaser takes a warranty, he must rely on that and not appeal to equity.

It seems to me that the contract in the bill mentioned, was free from any suggestion of falsehood or concealment of the truth; that it was a catching bargain by the purchaser, Pollock, with a covenant of warranty, given and accepted, against a difficulty not overlooked; that in such case a court of equity ought not to interfere before any breach of the warranty, unless upon the discovery of some hidden fact which clearly demonstrates that the vendor had nothing to sell, and that the purchaser acquired no benefit: and that the proof in this cause does not present a case in which a court of equity ought not to assist the complainant. The cases of *Bumpurs vs. Platner*, 1 John. Ch. ca. 213; *Abbot vs. Allen*, ex'or. of Allen, 2 John. Ch. ca. 519; *Miller vs. Long*, 3 Marsh 386, are in point.

It is, therefore, my opinion that the decree of the circuit court be reversed, and that the cause be remanded, with directions to that court to dissolve the injunctions with damages, and dismiss the bill, with costs—but by the opinion of the majority of the court, the decree is to be affirmed.

Conclusion,

Wickliffe, for plaintiffs; *Talbot*, for defendant.

VOL. VII.

MOTION.

Stephenson's adm'r. &c vs Barnett &c

Case 6.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

Constitutional law. Obligation of Contracts.

April 18.

Judge OWSLEY delivered the Opinion of the Court.

Case stated.

THE administrator of Stevenson brought an action at law, against David McAlexander and Wm. Barnett, on a note executed by them to the intestate, the twenty-seventh of April, 1816, for two hundred and sixty-four dollars thirty-two cents, payable twelve months after date, with interest from the date. Judgment was recovered by the administratrix for the amount of the note, with interest and cost, against McAlexander and Barnett, and on the 24th of July, 1826, thereafter, an execution was issued against their estate, for the amount of the judgment. The execution was levied on the estate of the defendant, Wm. Barnett, and on the 5th of September, 1826, he, together with Joseph Barnett, replevied the debt, by executing bond for the payment of the amount, and interest, within three months.

The Barnetts, by whom the bond was executed, afterwards moved the circuit court of Madison county to quash the bond, and the court being of opinion, that instead of being payable within three months, the bond ought to have been made payable within two years, quashing the bond.

Acts allowing a replevin of two years unconstitutional as to contracts made before the enactment, according to Lapsley and Brashear, & Blair and Williams.

The cases of Blair &c. vs. Williams, and Lapsley vs. Brashear &c. 4 Littell's Reports, are decisive against the circuit court, and the principle adjudged in these cases is still approved.

A majority of the court, the Chief Justice dissenting, are, therefore, of opinion that the judgment of the circuit court quashing the bond, must be reversed, with cost, the cause remanded to the circuit court, and the motion of the defendants in error overruled, with cost.

Chief Justice dissenting.

Turner, for plaintiff; Breck, for defendants.

Snoddy vs. Maupin.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

DEBT..

Case 7.

Judgments. Nil teit record. Variance. Practice. Costs.

Judge OWSLEY delivered the Opinion of the Court.

April 18.

SNODDY brought an action against Maupin and Smith, in the circuit court, and recovered judgment therein, against them, for three hundred and fifty dollars debt, twenty-six dollars and twenty-five cents damages, together with his cost expended in the prosecution of his action. An appeal was prayed by Maupin and Smith, from the judgment, and by the decision of this court the judgment was affirmed, with damages and cost. On the return of the cause to the circuit court, the opinion of this court was entered as the judgment of that, and judgment there entered against Maupin and Smith, in favor of Snoddy, for the cost which had accrued since the first judgment of that court.

Original judgment, appeal to this court, judgment affirmed, and mandate entered below, and costs.

Snoddy afterwards brought an action of debt against Maupin and Smith, upon the judgment first recovered by him in the circuit court.

Debt on the judgment first recovered.

The amount of the debt demanded by him in his declaration is three hundred and eighty-seven dollars and fifty-four cents, of which sum three hundred and fifty dollars is alleged in the declaration to be for debt, twenty-six dollars and twenty-five cents for damages, and the residue for costs adjudged to him by the determination of the court in the judgment sued on.

Count.

The writ which issued against Maupin and Smith was executed on the former, and as to the latter, returned by the sheriff no inhabitant, and an abatement of the action was thereupon entered as to Smith.

Abatement as to Smith by Sheriff's return.

Maupin then moved the court to dismiss the cause as to him, because it was abated as to Smith, but his motion was overruled. Maupin then pleaded several pleas, one of which is *nil teit record*, upon which issue was taken by Snoddy, and a trial thereupon had by the court, and judgment rendered against Snoddy in bar of his action.

Judgment on plea of *nil teit record* for defendant.

SNODDY
vs.
MAUPIN.

After the affirmation here of a judgment of the circuit court, and entry of it below, and judgment for costs, plaintiff may maintain debt on the original judgment.

From that judgment Snoddy appealed.

The judgment cannot, we think, be sustained. After the judgment first recovered by Snoddy against Maupin and Smith, was affirmed by this court, there was undoubtedly nothing to prevent Snoddy from maintaining an action against them for the amount of the judgment, and it was perfectly correct for him, as he has done in this action, to declare on the judgment first rendered by the circuit court, though the opinion of this court, affirming that judgment, was afterwards made the judgment of that court. In declaring, the judgment ought, it is true, to be described with the requisite certainty and precision, and the only question worthy of notice, involves the enquiry, whether or not there exists a fatal variation between the judgment described in the declaration and that contained in the record, which was produced by Snoddy on the trial of the issue.

Error of the Clerk in the taxation of the costs in such action is not available on the trial of the plea of *nul tuit record*.

If there be a variance of any sort, it exists between the amount of the cost alleged in the declaration to have been recovered by the judgment, and that contained in the record given in evidence. In other respects there is a perfect correspondence between the judgment alleged and that proved, in every particular; and as to the cost, the amount taxed by the clerk and certified by him, with the copy of the record used in evidence, agrees precisely with the amount of cost alleged in the declaration to have been adjudged to Snoddy in the judgment. But it was contended in argument, that in taxing the cost the clerk has committed an error to the prejudice of Maupin and Smith, by charging them with greater sums than are allowed by law for like services, and hence it was insisted that the record used in evidence, went not to prove a judgment for the amount of cost alleged in the declaration, and that in consequence of the variance in respect to the amount of cost, between the judgment alleged in the declaration and that proved by the record, the court was correct in deciding the issue against Snoddy. Whether or not, in taxing the cost, such an error has been committed by the clerk, we shall not stop to enquire,

because, if there be such an error, it forms no sufficient reason for deciding the issue against Snoddy. The taxation of cost, is, by law, confided to the clerk, and to allow an error in the taxation, to defeat an action predicated upon its correctness, would be highly unjust and absurd.

SNODDY
vs.
MAUPIN.

The amount to be recovered may be less than the sum demanded in the declaration, and it would tend more to the ends of substantial justice, to allow the error of the clerk, if any there be, to be used as a defence, in reducing the amount claimed in the declaration.

Such error may be shewn in diminution of the sum to be recovered in the action.

The judgment must be reversed, with cost, the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

Caperton, for plaintiff; Turner, for defendant.

Bush's adm'x. vs Bush.

Error to the Clarke Circuit; GEORGE SHANNON, Judge.

PETITION &
SUMMONS.

Case 8.

Pleading. Usury.

Judge MILLS delivered the Opinion of the Court.

April 18.

Absent—Chief Justice BABB.

THE plaintiff in error brought her petition and summons, on a note executed to her intestate, in the following words:

“On or before the 10th of May next, I promise to pay John V. Bush, one hundred and fifty round silver dollars, for value received, this 19th day of March, 1817. [Signed,] Will. T. Bush.

Teste, Will. T. Christie.

I will pay fifteen per cent on the above note until paid. [Signed,] William T. Bush.

The defendant cravedoyer and demurred—the plaintiff joined in demurrer, and the court gave judgment on the demurrer for the defendant, and the plaintiff has prosecuted her writ of error.

It does not necessarily follow that a promissory note, with an agreement underwritten by payor to

We conceive the court below erred. For although this note was given, when the act of assembly, then

BUSH'S
ADM'R.
vs.
BUSH.

"pay fifteen per cent on the above till paid" was given for an usurious loan. —Hence a demurrer to a declaration on such an instrument with the underwriting taken as part thereof, will not avail.

The usury must be pleaded.

in force, declared all usurious contracts void, yet there is no way on the face of the instrument, of arriving at the conclusion that the contract is usurious, even if we admit the memorandum at the bottom to be part of the note, and as constituting part of the demand for which the plaintiff craves judgment in her petition. The question of borrowing or lending, or a promise of extraordinary interest for forbearance, is that on which the question of usury rests, and there is nothing on the face of the writing which proves that the fifteen per cent was promised, in consideration of forbearance, or for some other consideration, and if it was based on any other legal consideration, the stipulation was valid. It was, therefore, by plea to fact alone, that the defendant could avail himself of the usury, if it exists.

Judgment reversed, with costs, and cause remanded, with directions to enter judgment for plaintiff, unless the defendant shall apply for, and obtain leave to withdraw the demurrer and plead to the merits of the action.

Wickliffe and Hanson, for plaintiff; *Crittenden*, for defendant.

CHANCERY

Case 9.

Sanders' heirs vs. Morrison's ex'ors.

Appeal from the Owen Circuit; JESSE BLEDSOE, Judge.

Parties in chancery. Practice in this court. Trusts. Jus accrescendi. Executors.

April 18.

Judge MILLS delivered the Opinion of the Court.

Absent—Chief Justice BIRD.

Decree of the circuit court.

Morrison's derivation of title objected to by Sanders.

MORRISON filed his bill on an adverse conflicting entry, to recover land against Sanders, who held the elder grant. The court below gave him the relief prayed, and from that decree Sanders appealed. Morrison and Sanders have both died pending the appeal, and the cause has been revived in the name of their respective representatives.

The appellants now question the title of Morrison, and their ancestor required proof of title in his answer.

The title set out by Morrison, is an entry in the name of Andrew Shriver, a patent to the late George Nicholas, as assignee of Shriver, and the will of Nicholas devising the land in fee, to said James Morrison and Joseph H. Daviess, and in trust for the payment of his debts, and to be conveyed in portions to his wife and children.

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VS.
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EX'ORS.

The appellants except to the will as not proved either by a certificate from a recording office, or by witnesses to be the will of Nicholas. We waive that question, as it may in a future stage of the cause arise in another shape, because we are of opinion, that the bill of Morrison by his own shewing, admitting the copy of the will to be genuine, which he has made part of the bill, shows such a defect of parties as prove conclusively, that he is not entitled to the decree which he has obtained on the merits.

Question on the title waived, because the necessary parties are not before the court.

The devise in the paper relied on as a will, after appointing Morrison and Daviess as his executors, is to this effect: Will of Geo. Nicholas.

"I hereby give them the fee simple on my whole estate upon the following trust—that they shall permit my wife to hold my house and lots near Lexington, my farm near that place, and the negroes belonging to that farm, and one dwelling house and all the stock belonging to that farm, and every kind of personal property, in or belonging to our dwelling house, wherever that may be situate at the time of my death, for her life, and that they convey the said property after, her death, to any child or children of ours, that she may give it to by her last will, and that they pay her annually, during her life, the sum of five hundred dollars; that they sell so much of the rest of my estate, which in their judgment can be best spared, to comply with my contracts, and pay my debts, and that they convey all the residue of my estate of every kind, to all my children who shall attain the age of twenty-one years, or money in equal proportions, and this division is to be made at their discretion, either partially, or of the whole residue at once, as will best suit the wants of my family and the situation of my debts, and my executors are to be the judges of the equality of the division,

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HEIRS
vs.

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EX'ORS.

Where land is devised in trust, to two executors, saying nothing of survivor on the death of one of the executors, a moiety passes to his heirs or devisees.

Trust estates pass as others, unless it is otherwise provided by the Will, or other instrument of conveyance.

The *jus accrescendi* is destroyed by the Statute in trust estates, as well as all others.

each child to have an estate in fee in the part to be allotted to him or her."

This will is dated May 3rd, 1797, and has not one word in relation to the survivor taking the estate between the executors, and the vestiture is joint.

Morrison states in his bill that Daviess is dead, and that he is the sole surviving executor and trustee, and hence he would have it inferred that the trust estate survived to him, and the question is, can this inference be admitted? We conceive not. A moiety of the estate descended to the heirs of Daviess, or might have been devised by his will, if he made one, and therefore, Daviess' heirs or devisees, as the case may be, were necessary parties to a suit of this nature to try the title of the land. With this agrees the decision of this court, in the case of Waggener vs. Waggener, 3 Monroe, 542.

There is nothing to prevent a trust estate from descending or being devised, unless such transmission of the title be forbidden by the terms of the original grant to the trustees, and that is not the case in this will. In England, the case of joint trustees were different. The doctrine of survivorship which existed in that country would still keep the estate in the survivor. But here, since the destruction of the doctrine of survivorship, the case is different.

Knowing the inconvenience of spreading a naked trust of this kind into so many hands, by a descent or devise, we have resorted to the act of Assembly, 2 Dig. K. L. 686, to discover whether we could not make a trust of this nature, an exception to the general rule of destroying survivorship between joint tenants; but in this resort we have been disappointed, and that act is express and decisive in all cases, even in joint trust estates, and is conclusive against the appellee, and precludes his escape. Survivorship is there taken away between all joint tenants, "whether they be such as might have been compelled to make partition or not, or of whatever kind the estate or things holden may be." It therefore expressly includes unlimited trusts as this, and leaves

the title to pass to the representatives of the one dying, to be held in common with the survivor.

The decree must, therefore, be reversed with costs, and the cause be remanded to the court below, with directions there to dismiss the bill with costs and without prejudice, unless the proper parties are brought before the court in a reasonable time, to be fixed by the order of the court below.

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EX'ORS.**

Reversal, and
order for proper
parties, or
bill to be dis-
missed.

PETITION FOR A REHEARING BY THOMAS B. MONROE.

It seems to the counsel for the plaintiffs in error, that according to the principles ever heretofore acted upon, and lately perspicuously stated, and fully recognized in the case of Russell's heirs against Craddock, 4 Monroe, 384-5, the question of the right of Morrison to a moiety under the grant to Nicholas, must be now decided.

Petition for a
re-hearing.

In that opinion it is said, there are three classes of cases; one in which, "the party claimed the title by devise or descent, either immediately to himself, or mediately, through, or under some person who claimed by *devise*, or descent, and had failed to prove his title by exhibiting that *devise*, or proving that descent, as a necessary link of the chain of title," in which this court has absolutely dismissed the bill without regard to what the decree was below, or which of the parties brought the case here; the second are of cases where the court has corrected the dismissal of the court below when it was absolute, and directed it to be entered without prejudice; and the third when the complainant having prevailed in the circuit court, and it appeared here on the defendant's appeal, that the complainant shewed a deduction of title under the junior grant to some undivided part, in which the cause would be sent back, with liberty for complainant to make new parties.

Now it is supposed by us, if the will of Nicholas is not proved, the complainant has wholly failed to shew any title derived to him for any interest whatever in the land, and that his case falls within the first class, and the cause ought to go back for an

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VS.

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EX'ORS.

Petition for a
re-hearing.

absolute dismissal, or at least without prejudice, and not for further preparation.

If the will of Nicholas had been proved, then the complainant would have shewed title to part, and the case would have been like Russell and Craddock's; but if he has not, then his case must be like the cases cited in the argument of that case, on the authority of which, the counsel of Russell contended Craddock could not be allowed to proceed further on the return of the cause, and the complainant must submit to a dismissal absolutely for the want of proof of a whole, and every part of the title by devise; and though he may complain of the rule as rigorous, it is obvious, it will be no more than decreeing for defendants in other cases, where the whole thing is demanded in the bill, and the title to no part is maintained by the evidence.

It is perfectly plain that the devise is not proved. It is denied in the answer of Sanders, that George Nicholas made a will; as the court have said in the opinion, it is said in the bill, that "Nicholas made and published his will, an official copy of which will is herewith filed, and prayed to be taken as part of this bill;" and there is a paper found in the record purporting to be the will of George Nicholas, with an affidavit of Robert Scott and Thomas Bodley attached to it, dated the 12th October, 1816, nearly a year before the commencement of this suit. But there is no witness to this pretended will; the affidavit does not state the original was in the hand writing of Nicholas, or even that the signature was his, or that he ever did in fact publish it. It is not stated that the will was ever proved in the county court of Fayette.

The affiants say, they are informed, and believe it was lodged in the office to be recorded; nothing is said of its ever having been proved in court. As to the due enquiry and examination the affiants say they and Morrison made for an authenticated copy, we would say, that after the original had been proved, such an affidavit would have come more properly from the executor.

It was said in argument, that as the alleged copy of the will was found in the record without objection, it is now too late to say the will was not proved. It is a rule well settled, where the execution of a paper set up or exhibited in a bill, is denied, and complainant offers depositions to prove its execution, the whole exhibit and proof come here together, and this court will decide whether the instrument be proved or not, on the pleadings and evidence. It was not necessary for the defendant to object, or to except to the exhibit, it was enough for him to deny it in his answer; but enough of this. The court has said the devise was put in issue, and the question properly raised here, except for the want of parties, and we humbly trust, that upon a review of the case, the court will find that no obstruction. And we have no doubt the court is satisfied the will is not proved.

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EX'ORS.

Petition for a
re-hearing.

A re-hearing is respectfully asked.

The Court overruled the motion for a re-hearing, and the opinion stands unaltered.

Monroe and Haggin, for appellants; *Crittenden and Wickliffe*, for appellees.

South's heirs vs. Thomas' heirs.

Appeal from the Bath Circuit; S. W. ROBBINS, Judge.

EJECTMENT.

Case 10.

Practice. Affidavits. New trials. Surprise. Sunday. Witnesses. Statutes of limitation to entries on land. Devises. Descents. Exceptions. Infancy Judicial decisions.

Judge MILLS delivered the Opinion of the Court.

April 19.

THE heirs of Edward Thomas recovered a judgment in ejectment, against the heirs of Benjamin South, on a patent issued to their ancestor, after proving its boundary, and that the tenants resided within it, and that their ancestor died in 1801, leaving all of them infants, some of whom had not arrived to the age of twenty-one years, at the commencement of the suit.

Judgment in
ejectment, for
Thomas'
heirs against
South's.

On a subsequent day of the term, the heirs of Motion for

7th 59
114 197

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HEIRS.**

new trial on
affidavit over-
ruled and ap-
peal.

South moved for a new trial, relying on the affidavit of one of their number, who was the active person in defending the suit. He deposed, that he had directed his counsel to summon John M'Intire as a witness, and that M'Intire died only two or three weeks before the commencement of the term, by which his testimony was lost; that he, the defendant was detained in Frankfort by subpoena, and thus compelled to attend court there on a criminal prosecution, until the Saturday evening previous to the day the cause was set for trial, which was the Monday following, at Bath courthouse, and the cause was tried on Tuesday, that he did not know of the death of M'Intire the witness, till the first of the term; that if he could have been at the trial, he could have discovered other witnesses, (as he has since found them,) who could have proved the same defence intended to be made out by M'Intire; that the defence which he could have made out by M'Intire's testimony, was a possession of twenty years, and that Benjamin South, from whom the defendants derived title by descent, had settled on the land in the year, 1779, and that possession was continued ever since; that consequently the adverse possession relied on, would reach beyond the death of the ancestor of the lessors of the plaintiff, and the statute law commenced running in the lifetime of the ancestor, and therefore the right of entry would be tolled.

The court overruled the motion, and South's heirs have appealed.

Where a suit, by or against numbers, is managed by one, which is the better course, his affidavit of facts and of surprise, on a motion for a new trial, is sufficient without the others.

As the tenants relied on one of their body to conduct the defence, and he had previously attended to it, it cannot be wrong to admit his affidavit without the rest, as one would act with more efficiency than many, and his lack of attendance, owing to uncontrollable circumstances, would be sufficient without accounting for the absence of all. It is well known that suits, where they are prosecuted or defended by numbers, are better conducted by one, as the representative of the whole, because that relying on each other, and feeling less responsibility when divided into different hands, the suit managed by all may be often neglected.

We conceive that the death of the witness, and the prevention of the acting defendant from attendance on the cause, by the process of another court, are circumstances which might well account for the unprepared state of the defence, and are such as demand a new trial, if the defence can be of any avail.

**SOUTH'S
HEIRS
VS.
THOMAS'
HEIRS.**

Surprise by death of witness, absence of party in consequence of being summoned as a witness in another court.

The acting defendant could not have been there, when the cause was set for trial on Monday, or when it was actually tried on Tuesday, unless he had travelled on Sunday, which cannot by law be required of him.

Litigants not required to travel on Sunday.

The question therefore, must turn upon the validity of the defence which he relied on. For however important his witnesses may be supposed by himself, yet if their testimony must be unavailing if introduced, it would certainly be useless to give way for another trial, in which the same party must be equally unsuccessful. The affiant was bound, in an affidavit, like this, for a new trial, to disclose what the defence was which he intended to make out on the second trial, in order that the court might judge whether it would be of any avail.

Affidavit for a new trial, because of the absence of the party and his witness, must state the facts the witness would prove.

This he has done, and in doing so he has shown that he does not expect to be able to disprove any of the facts relied on by the lessors of the plaintiff, but to show that their right of entry was tolled by adverse possession, commencing in the lifetime of the ancestor. He does not expect to show that they took as purchasers, but only as heirs, and he designs contending, that as the cause of action accrued in the intestate's life, the bar must continue, his death and the descent to the infant children notwithstanding. In this point the law, as heretofore settled by this court, is against him.

Limitation of 20 years.

We are all aware, that the courts of England gave the construction contended for by the appellants to their statute, and the Supreme court of the nation has given the same construction to ours, although differently expressed from the English statute. But this court, in the case of *Machir vs. May &c.* 4 Bibb, 43, and afterwards in the case of *Sentney vs. Over-*

On the casting a descent upon minors of land in the adversary possession of others, the limitation of 20 years cease running

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against them,
and they have
the benefit of
the exception

Cases ad-
judged by this
court, have
settled the
law, whether
right or
wrong at
first.

ton, 4 Bibb, 446, has had occasion to notice the different expressions in our statute, and consider their effect, and has been compelled to say, that on casting a descent to minors, the bar ceases, and that the expressions "or coming to *them*," means the hour when the action accrues to *them*, who are within the savings of the act.

The same construction has been admitted in the cases of Kendall vs. Slaughter, 1 Marsh. 376; May vs. Slaughter, 3 Marsh. 511; Floyd's heirs vs. Johnson's heirs, 2 Litt. 109; M'Intire's heirs vs. Funk's heirs, 5 Litt. 34; Haddox's heirs vs. Davidson, 3 Monroe, 42; so that whatever might be the opinion of the court, was the question new, this court cannot depart from the former adjudications, and conceives the matter ought to be at rest.

According to the rule as thus settled, the proof which the appellants intended to make by M'Intire, or by the witnesses recently discovered, would have been of no avail, and it would have been nugatory to have granted a new trial, for the purpose of letting in a void defence; and void it must be, unless the court should now overrule the decisions of a series of years, given while controversies of this nature were numerous, and were settled accordingly. This would be hazardous to the community, and would jeopardize settled rights; lands must again change their owners and pass into other hands. The decisions on which the principle now recognized was founded, has grown into a rule of property, and estates have slept under it quietly. If it is now reversed, as the appellants require, the settled law of thirteen years must be shaken, and in that length of time we should have made no progress, but have retrograded in stilling the controversies relative to land, and again opened up those sluices of litigation, which have so long afflicted this country.

It is not so
important the
law should be
rightly set-
tled as that
it should re-
main stable

It has been often said, that it is not so important that the law should be rightly settled, as that it should remain stable after it is settled. This is true, for attempts to change the course of judicial decision, under the pretext of correcting error, are like experiments by the quack on the human body.

They constantly harrass and often jeopardize it. But notwithstanding, the point is so well settled by former adjudications, as to present danger if it is again opened, and the numerous adjudications affords an estoppel to enquiry and argument, yet we do not hesitate to give our reasons for an adhesion to it, as the court did when it was first adopted.

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after it is settled.

The acquiescence of the community in the decision, may also be used as an argument. There has been a succession of judges on the bench, except as to one member of the court. Yet there has been no conflicting decision, and the legislature, who has the statute of limitations in their power, have never attempted so to reform it, as to get clear of the construction given to it by the court below, twelve or thirteen years since.

Acquiescence of the community and the legislature in the judicial construction of a statute, evidence of the correctness of the decisions.

But we do not rest the case on this ground, but profess ourselves prepared to maintain that the decision is right.

The act of limitations adopted the general provision, that twenty years should bar all actions therein named. This was enforced by the court, and when there was no existence of any disabilities on the part of the plaintiff or demandant against such a defence, he was declared to be barred.

But there were different classes of claimants or plaintiffs, one class was, where there were more plaintiffs than one, and a part, but not the whole, were under the disabilities of coverture, infancy, &c and the question arose, what was to be done with them? The court answered in divers cases, and especially in the case of McIntire's heirs vs. Funk's heirs, that all such were barred.

Where there are more plaintiffs than one, and part only are under the disabilities, the statute of 20 years runs against and bars all.

Another class was a set of infants or married women, who took not the land by descent, but by devise, and the question was made whether such *acquiring or coming* of title to them was within the meaning of the act? The court responded, in the case of May's heirs vs. Slaughter and subsequent cases, to the question, in the negative, and pronounced them barred.

Where the statute commences running it continues to run against the devisees or other alienees under any of the disabilities.

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One disability cannot be added to another, in any case.

A still further class presented themselves. They were infants when their ancestor's death let the land pass to them by law. It was adversely settled by strangers, and the infants had neglected to pursue their rights, being still infants, or otherwise disabled until another descent was cast on persons still infants or disabled, and they claimed to add disability to disability, and to recover. The court determined that it could not be done, in the case of Floyd's heirs vs. Johnson's heirs, and that such a principle, as avoiding the bar by supervening or successive disabilities, was wholly inadmissible, and hence all the absurdity or horror of a latent right being preserved through successive generations for centuries, turned out to be a mere chimera, however it may have been magnified by the ancient sages of the law.

These stern and inflexible decisions on the statute, were calculated to increase the repose of the country, and went far to lay the controversies asleep relative to lands, and did leave but very few who could escape the imperious provisions of the statute.

Where an adverse possession is taken of lands in the lifetime of the owner, and on his death the title descends on his heirs all within disabilities, the limitation ceases to run against them.

In such cases, the infants shall have the time allowed by the statute after they all attain full age.

There was still however one small class, (and a small one it is,) still to be decided, and that was the case of an ancestor holding lands on which an adverse claimant entered, and the ancestor had never ousted him during his life, and perhaps had not time to do so, until removed by death, leaving his title to his children, who were all infants. The question in their case was, did the statute, which commenced running in the lifetime of the father, continue to run on, or was it suspended on account of their infancy, after the death of the ancestor? This was the question made in the case of May's heirs vs. Machir, and Sentney vs. Overton, and the court answered it in the affirmative, and that is the point which we are required by this appeal to reconsider. The question was to be answered by the statute, and the lights cast thereon by former adjudications were then, no doubt, appealed to, with every disposition to follow them, as it would bring over this class of claimants within the statute. But this was found impossible, if the words of the statute were regarded.

When the British authorities were examined, the first leading case was the case of *Stowell vs. Youch, Plowden, 353*. That decision did not take place on a statute limiting all real or mixed actions, but fixing the time, after which certain fines levied as therein described, should not be disturbed. The general limit was five years. But certain persons were excepted from its operation on account of disabilities.

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British statute of limitation of five years, in relation to certain fines of land.

The exception, or saving in the statute, was thus expressed: after fixing the bar of five years, to commence from the time when the estate, or cause of action "shall first grow, remain or descend, or come to them after the said fine engrossed, and proclamation made," the exception reads—

"And if the same persons, at the time such action, right and title descended, remained or come unto them, be *covert de baron*, or within age, in prison, or out of this land, or not of the whole mind, then it is ordained by the said authority, that their action, right and title, to be reserved and saved to them, and to their heirs, unto the time they come and be at their full age of twenty-one years, out of prison, within this land, uncovert and of whole mind. So that they and their heirs take their said action, or their lawful entry, according to their right and title within five years, next after that they come and be at full age &c."

The question which arose under this proviso, was at what period the counting of the bar must commence, in the case of a person disabled, whether at the moment the original cause of action *accrued*, or at the time when it *descended* on the person disabled. Or, in other words, did the expressions "descended, remained, or come unto them," refer to the same descending, remaining or coming, mentioned in the enacting section, within five years after which the action must be commenced, or to a subsequent "descending, remaining or coming" to the person disabled? The first was held the true construction. For it is evident that the persons in the exception, are at least part of the same persons named in the bar, for it is said, that "if the same persons at the time

Decided on this statute of England, that the descent of the title on an infant heir, did not stop the running of the statute.

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such action, right and title descended &c," evidently alluding to the same persons mentioned in the bar, and the same *descending, remaining* &c. Hence it was held that but one accruing of title was contemplated in the bar and exception. But it will be seen in the sequel, that the words, as well as the true interpretation of our statute are different.

British statute of 21 James I Ch. 16, of twenty years limitation to entries on land.

The next statute to which the British decisions apply, is the 21 Jac. 1, c. 18, and that limits positively the same causes of action or right of entry, which our own does, to twenty years, "next after the title and cause of action *first* descended or fallen, and at no time after the said twenty years."

The proviso then is, "that if any person or persons, that is, or shall be entitled to such writ or writs, or shall have such right or title of entry, be, or shall be, at the time said right or title *first* descended, accrued, come or fallen, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned or beyond the seas, that then such person and persons, and his, and their heir or heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act."

Held on this act, that when once the statute commenced running, notwithstanding a descent of the title on an infant, it continued to run.

The British courts decided that this proviso only saved persons, who, at the first commencement of the cause of action, were disabled, and that the "descended, accrued, come or fallen," in the proviso, meant the same "descending, accruing, coming or falling" named in the bar, and well they might, for it is difficult to give the act any other construction. The words "to them" are left out, and in order that the doubt whether the provision intended the original cause of action named in the bar, or the time that such cause passed to the disabled person might be removed, the word "*first*" is inserted, so as to show clearly, that no other "accruing or coming" but the *first*, or original cause of action was intended.

Virginia statute of twenty years, not adjudicated

When Virginia, as a colony come to legislate on the subject, in the year 1705. (See Bod. Laws, 147,) she adopted different language from the statute of James, and continued it in her code till the separa-

tion. It is substantially the same with our own statute now under consideration: How Virginia construed it on this point before the revolution, we have not the means of ascertaining, and since then, we do not recollect that any of her reported cases have settled, or even touched the question.

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upon as to
this question.

Our act adopts twenty years in the bar, directing them to be counted, commencing "next after such title or cause of action accrued, and not afterwards." Had the statute stopped at this point, it would have included every person, and we never should have been perplexed with the present question. But a proviso adopting a different rule for some persons, follows in these words:

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Kentucky of
the 20 years.
limitation.

"Provided, nevertheless, that if any person or persons entitled to such writ or writs, or to such right or title of entry as aforesaid, shall be, or were under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or not within this Commonwealth, at the time such right or title *accrued or coming to them*, every such person, and his or her heirs shall, and may, notwithstanding the said twenty years are, or shall be expired, bring and maintain his action, or make his entries within ten years after such disabilities removed, or the death of the person so disabled, and not afterwards."

—Proviso to
the statute.

The difference between this act and the British statute of fines, as well as that of James, is at once perceived. Both the words and the order of expression is different. The statute of fines, shows that the persons in the proviso, and those in the bar are the same, and the same accruing of title is designed in both. The identity of the persons and accruing of the cause of action in the bar, and the proviso in ours, is not asserted; but it is asserted by construction, and that construction is negatived by the words, and grammatical construction of the proviso. The statute of James is still more explicit, and the accruing of the action there named in the proviso, is expressly declared to be the "first." In ours the "first" is left out, and we are left to fix the accruing of the cause of action to the person disabled, as to the moment from which we must begin to count the bar. In the two British

Diversity between the British statute and 21 James 1, and the statute of Kentucky of 1796, limiting the right of entry into lands, in case of descent on infant heirs.

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statutes, the proviso makes a part of the enacting paragraph, and is incorporated with it by relative words, showing that one "accruing or coming" of the cause of action is designed in both, and the office of the proviso, is intended merely to show the different consequences, which must flow from its accruing to the person disabled, and him not disabled, at the time of one, and the first accruing of the cause of action. Instead of this, the proviso of ours is an original and independent rule, and the identity of the "accruing and coming" or of persons named in the bar as well as the proviso, could not have been found out, or thought of, from the letter of the act, if the question had not been prejudiced by former adjudications on other statutes somewhat, but not precisely similar. The fair construction of our statute is this, the proviso adopts, with regard to disabled persons, its own and a different provision, and a different or additional moment of count, from that provided for in the bar. It does not say "if the same persons," or "any of the persons" named in the bar, as the statute of fines did. But if any person or persons entitled and disabled, shall have such cause of action, he or they shall look to their own situation, and begin their count at some point for the commencement, when his or their interest first accrued, or his or their cause of complaint first began. The index to this point is given to him, and that is not the moment the cause of action accrued at *first* in the life and during the interest of another, when he or they had no interest, but it is the instant that the cause of action came to him "or them," whether that cause had its commencement before, and descended, or originated, during his own interest and disability united. Here the important difference between this act and the statute of James is apparent. The latter expressly puts in the "*first*" accruing by putting in the word "*first*," and leaves out the words "*to them*." The former admits the word "*first*," and adds in another place "*to them*," in order to show that a different, or additional point of time was in the eye of the legislators. For what noun is the pronoun "*them*" used in this proviso? Can it be referred by any gram-

matical rules, to the persons under the general provision named in the bar, or is it substituted exclusively for the "person or persons" mentioned in the proviso? The answer to this question does not admit of a doubt. The latter was intended. Couple this to the omission of the word "first," and we immediately rest on the situation of the disabled person, when he gets the cause of action, or title, whether that be the moment of the descent cast upon him, or afterwards, during his disability.

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But it may be urged that the case of Floyd's heirs vs. Johnson's heirs, is inconsistent with this construction, and that a cause of action cast upon an infant from an infant ancestor, is not different from one descended from an ancestor laboring under no disability, and consequently, a succession of disabilities may ensue. For if a title or cause of action once descended, during its existence to an infant, loses the effect of the bar, on account of the infancy at the first descent, of course the person to whom it descends in the second or third instance, are equally within the terms of the proviso, and entitled to an equal protection. The force of this argument is perceived, and its conclusion is plausible, and it would be unanswerable, if the statute provided for any, but one descent or accruing of action or title, and excused any but one. But this it does not do. If a person disabled, for instance an infant, once holds a claim or right of entry, or cause of action, whether that cause of action commenced during the time of his ancestor or his own time, the saving applies to him once, and but once. If he has had occasion to apply the saving once, it cannot be applied again by another, according to the words of the statute. Hence the question which arises, when an existing cause of action descends to an infant, is, has his ancestor had the use and benefit of the saving. If he had, then it is exhausted in once using. If his ancestor had not the benefit of the saving, then he can apply and use it for once. This results from the last clause of the proviso, and does not rest on the words "descend or coming to them." The last words of the proviso, say, he may "bring and maintain his action, or make his entry within ten

If the ancestor, against whom the adversary possession was taken, dies within age, the disability of his heirs (of all of them) on whom the right descends, avails them nothing: otherwise where the ancestor was of full age.

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[now three,] years next after *such disabilities* removed, or death of the person so *disabled* and not *afterwards*. These expressions expressly limit the saving to one disability, and exclude plurality and succession. It terminates the saving after the death of one disabled person, although the descent may be cast upon an infant or person disabled, and precludes ~~all~~ new actions, or saving power "*afterwards*." The apparent inconsistency between the two cases of a cause of action descending from one adult to an infant, and from an infant to an infant, is not produced by any words of the proviso, and is provided against in another clause and member of the proviso. It was foreseen by the makers of the law, and settled by them in the concluding words of the proviso.

Statute of
Kentucky
paramount to
to the British
and other ju-
dicial deci-
sions on these
acts.

We have been thus particular in vindicating the previous decisions of the court, because we are aware of the multitude of decisions which may be quoted from the British books, and some of American character, on statutes similar, but not the same, and in which a slight change in words make an important difference in the sense. These are so numerous that we have supposed it would be an ostentatious parade of authority to cite them all, and too great and unnecessary labor to review them. They are all opposed by one authority too strong for a greater host, and that is, the act of the legislature itself, which, when passed on a subject within the legitimate powers of the legislature, always has had, and we trust will still have, more weight with this court, than all the adjudged cases from Bracton to 3 Monroe.

Diversity be-
tween the ju-
dicial deci-
sion of Ken-
tucky and
England on
the statute
of frauds and
perjuries, and
limitation of
actions on
contracts.

But all judicial authority is not against us, for the Supreme court of South Carolina, in adjudicating on their statute, which is like ours, has given a similar decision, 2 Stark. Evi. 901, in note. We therefore subscribe still to the doctrine of the former cases on this point, not admitting that the British decisions, if their statute was even more similar to ours than what it is, would be conclusive and absolutely binding on this court. For in other cases we have had to depart widely from them, to give

effect to statutes, which they, by construction, had virtually repealed. Witness the act to prevent frauds and perjuries, and this same statute of limitations on other points, barring contracts after a specified period. Then the British authorities were rejected in mass, and the plain unsophisticated sense of the statute was allowed to operate. It is true, that in all personal actions, we have adopted the British construction on their statute uniformly, because the saving or proviso in these cases, is expressed differently from the section or proviso now under consideration, and this is what the court has settled and admitted in the case of *Beauchamp vs. Mudd*, 2 Bibb, 538, and with that agrees all decisions in personal actions. It may still be said that the train of the decisions now re-considered, contain a doctrine not expedient or politic, and that to allow the helpless infant, on whom a disputed title of land is cast by descent, a day after he comes of full age, to recover it, is what the good of the community forbids. If this be granted, we answer that questions of policy and expediency belong to another department of government. It is ours to declare what the law is—theirs to mould it in conformity to the policy of the State, and with that department we leave this duty.

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But if we are mistaken in the true meaning of the statute, and it be conceded, that the train of decisions in question, several of which have not been reported, were based in error, still we repeat the danger of correcting it. The consequences may be more fatal, than a total disregard of British authorities for centuries. If it be said that these authorities, as well as those of the American courts are far the most numerous, and cover up a space of time exceeding two hundred years, still we are well aware, that *one* decision of this court, persevered in, as these have been, for thirteen years, is more regarded in this State, soon ripens itself into a rule of property, and enters more deeply into the interest of society, than all the British authorities for a hundred generations that are passed away; and reversing them and retracing our steps for a few years back, may not only be a way of removing

Precedents in
this court
of greater
weight than
the British
decisions.

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land-marks, as a sage of the law has expressed it, but of removing from land the owners themselves.

The judgment of the court, (the Chief Justice dissenting,) is therefore affirmed with costs.

Dissent of Chief Justice BIBB.

Cases of
Machir &c. vs
May &c. and
Sentney vs.
Overton,
deciding that
the casting a
descent of a
right of entry
on infant
heirs, stops
the running
of the sta-
tutes dissent-
ed from.

Opinion that
"the altering
settled rules
concerning
property, is
the most dan-
gerous way of
removing
land marks,"
concurred in.

THE court did decide in the cases of Machir vs. May &c. in 1815, 4 Bibb, 43, and Sentney vs. Overton, 4 Bibb, 446, in 1816; that although the statute of limitation commenced running against the ancestor, by reason of an adverse possession against him when under no disability, yet it ceased running upon the subsequent death of the ancestor, and descent to heirs under age, and that the heirs had ten years after disability removed to make entry and bring their action.

I concur in the opinion long ago expressed and often approved, that "the altering settled rules concerning property, is the most dangerous way of removing land marks." Such was the sentiment of Chief Justice Parker, delivered in 1717, in Goodright vs. Wright, 1 Pr. Wms. 399. In 1724, Lord Chancellor Macclesfield, in the case of Wagstaff vs. Wagstaff, 2 Pr. Wms. 258, declared his opinion was "never to shake any settled resolution touching property or the title to land, it being for the common good, that these should be certain and known, however ill grounded the first resolution might be." But contrasting the two decisions of Machir vs. May, and Sentney vs. Overton, with the other adjudications upon the statutes of limitation, they may be compared to two trunks from one root, blasted by the lightnings, and standing amidst a forest of evergreens.

Principles
and policy of
the Statutes
of limitation.

Our statutes of limitation were taken from the statutes of Virginia, and they were taken from the statutes of England, particularly from the statute of 21 James, I, ch. 16. This statute and others prior and subsequent thereto in England, as well as the statutes in the States taken from the statutes of England, have called forth very many adjudications. And whether the limitation be to actions real, per-

sonal or mixed, whether for limiting writs of form-
don, writs of entry, actions of trespass, detinue,
trover, account, or upon the case, or entries for
avoiding fines and recoveries, yet the savings in fav-
or of persons laboring under any of the disabilities
mentioned in the statutes, are so similar in all, that
the exposition of the proviso in any one, furnishes
the rule for a similar proviso in any other statute
or section. The objects of all the statutes of limita-
tion are the same, to protect against stale and an-
cient claims, whether well or ill founded in their
origin, but which may have been discharged or re-
leased, to secure against the machinations of dis-
honesty, when attempted under the advantages at-
tendant upon lapse of time, loss of papers and death
of witnesses, to quiet possessions, and extinguish
dormant claims, and to consult the repose of soci-
ety. There is so much wisdom in the enactment of
these statutes, and so much public tranquility result-
ing from them, that the wisest and ablest legislators,
judges and chancellors have endeavored to render
effectual the policy of those statutes, by enforcing
the bar against legal and equitable actions.

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In the construction of these statutes, it is an es-
tablished rule, that when a statute begins to run
against a title or claim, it continues to run until it
works a complete bar, without interruption from
the death of the claimant, and notwithstanding any
subsequent disability. *Stowell vs. Zouch*, *Plowd.*
com. 353; *Peck vs. The trustees of Randall*, 1 *John.*
Reports, 165; *Moore's heirs vs. White*, 6 *John. ch.*
rep. 372; *Damerest vs. Wynkoop*, 3 *John. ch. rep.*
131; *Beauchamp vs. Mudd*, 2 *Bibb*, 538; *Floyd's*
heirs vs. Johnson, 2 *Litt. rep.* 114; *Walden vs. The*
heirs of Gratz, 1 *Wheat.* 296. To these might be
added many others, which are referred to however,
by chancellor Kent in *Wynkoop vs. Damerest*.

It is an estab-
lished rule in
the construc-
tion of the
British Sta-
tutes of limita-
tion, that
wherever the
time has be-
gun to run, it
continues to
run notwith-
standing any
subsequent
disability.

The case of *Stowell vs. Zouch* was decided, 11
Elizabeth. The arguments began in the common
bench, in the sixth year of Elizabeth, and the mat-
ter was thence adjourned into the exchequer cham-
ber, before the chief Baron, and all the justices of
England. It was there argued fully and profound-

Case of *Stow-
ell vs. Zouch*.

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ly by the bar, and most learnedly and ably discussed by the judges. It was illuminated by all the genius and learning of Westminster Hall. Illustrations were drawn from the principles of the common law, other statutes, precedents, reason and policy, and finally decided by a great majority of the judges.

Running of the time of the statute of limitation of five years after fine with proclamation is not interrupted by the death of the disseizee and descent cast on his infant heir.

The case was, Zouch disseized Stowell, and levied a fine with proclamations. At the time of the fine, Stowell was under no disability; three years after the fine, Stowell died without entry or claim to avoid the fine; his right descended to his grandson, then only six years old. The infant made no claim to avoid the fine during his minority, but entered within one year after he came of age, and brought his writ of entry upon a disseizin against Zouch, who pleaded the fine with proclamations; Stowell replied the disseizen of his grandfather, his subsequent death within three years after the fine, that at the time of the descent to him as heir, he was of the age of six years only, and his entry within one year after his full age. To this replication Zouch demurred and Stowell joined in demurrer. The question was whether the death of Stowell, the grandfather, before the end of the five years given to avoid the fine, and the descent to the infant heir, gave him time after his full age to avoid the fine, according to the saving in the statute of limitations of 4 Henry, VII, ch. 24. The enacting clause, after prescribing the proclamations to be made, declares:—

Statute 4
Henry VII,
ch. 24.

Sec. 3. "And the said proclamations so made and had, the fine to be a final end, and conclude as well privies and strangers to the same, except women covert, (other than being parties to the said fine,) and every person then being within age of 21 years, in prison, or out of this realm, or not of whole mind, at the time of the said fine levied, not parties to such fine."

Sec. 4. "And saving to every person or persons, and to their heirs, other than parties in said fine, such right, claim and interest as they have to, or in the said lands, tenements, or other hereditaments, at the time of such fine engrossed, so that they pursue their title, claim or interest by way of action, or

lawful entry within five years next after the said proclamations had and made.”

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Sec. 5. “And also, saving to all such persons such action, right, title, claim and interest in, and to said lands, tenements, or other hereditaments, as shall first grow, remain, or descend, or come to them, after the said fine engrossed, and proclamation made, by force of any gift in the tail, or by virtue of any other cause or matter, had and made before the said fine levied, so that they take their action, or pursue their said right and title according to law, within five years next after such action, right, claim, title or interest to them accrued, descended, fallen or come.”

Sec. 7. “And if the same persons, at the time of such action, right or title, accrued, descended, remained or come unto them, be *covert de baron*, or within age, in prison, or out of this land, or not of whole mind, then it is ordained by the said authority, that their action, right or title, to be reserved and saved to them, and to their heirs, unto the time they come and be at their full age of twenty-one years, out of prison, within this land, uncovert, and of whole mind; so that they, or their heirs, take their said actions, or their lawful entry, according to their right and title, within five years next after that they come, and be at their full age &c.”

Sec. 8. “And also, it is ordained by the authority aforesaid, that all such persons as be *covert de baron*, not party to the fine, and every person being within age of 21 years, in prison, or out of this land, or not of whole mind at the time of the said fines levied and engrossed, and by this said act before excepted, having any right or title, or cause of action, to any of the said lands, and other hereditaments, that they or their heirs, inheritable to the same, take their said actions, or lawful entry according to their right and title, within five years next after they come and be of age of 21 years, out of prison, uncovert, within this land, and of whole mind, and the same actions sue, or their lawful entry take and pursue according to law.”

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Sec. 9. "And if they do not take their actions and entries as is aforesaid, that they, and every of them, and their heirs, and the heirs of every of them, be concluded by the said fines forever, in like form, as they be that be privies or, parties to the said fines."

I have copied this statute from Viner, title Fines, (vol. XIII, p. 260,) that the points argued and resolved, as reported by Plowden, may be more easily understood than by the extracts given in the report.

For Stowell, the demandant, it was argued:

Argument on
the part of
Stowell, that
he was with-
in the excep-
tion.

1st Ground.

I. That he was not within the body of the act, that he was out of the letter of the enacted limitation, but within the exception of the body of the act, as well as within the saving; that he was an infant at the time of the fine, and so excepted out of the limiting part, (of the third section,) and a stranger to the fine. They took a distinction between the exception contained in the limiting clause, and a saving. That all infants who had right at the time of the fine, as well as all infants who had not right, were excepted out of the third section; but that the 8 and 9 sections were made to prescribe the time for such.

2nd Ground.

II. That Stowell, not being comprised in the body of the limiting part of the third section, was clearly within the time prescribed and enacted by the eighth section, having been but three years and a few months old, when the fine was levied, only six years old when the right and title first accrued to him, and having brought his action in less than five years after he attained full age.

3rd Ground.

III. That if Stowell was comprised within the letter of the act, yet he was not within the sense and meaning of the enactment, but was aided by the first saving contained in the fourth section. That he was not party nor privy, to the fine; himself and grandfather were strangers; the act intended by the saving's to preserve the rights of strangers, by giving time to make claim against the fine; that as the grandfather died within three years after the fine,

and the right descended to the infant heir, the demandant, the law could not intend to require him to make claim, or impute laches to him until full age, and so he had come within due time, according to the sense of the statute; that he cannot be prejudiced by the death of his ancestor within the time allowed to make claim; that it was not the intention of the act to drive infants to make claim, or to impute laches to them.

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IV. They relied also upon the words of the second saving, (in the 6th section,) and that Stowell was within it, being an infant when the right first accrued to him, and having brought his action within the time prescribed to infants according to that clause, for the right had first descended to the demandant, and had descended to no other person after the proclamations made. 4th Ground.

V. They argued that the expressions in the 8th section, "having any right or title, or cause of action," did not allude to having such title at the time of the fine, but to the time of making entry, or suit taken within five years after disability removed. 5th Ground.

Lastly: They contended upon the equity of the savings, that he was not barred. 6th. Equity of the statute relied on against the bar.

But it was resolved by the court, that the object of the statute was peace and public tranquility, which is greatly to be preferred, and to have greater consideration in the exposition of the statute, than the injury which particular persons, as infants, feme coverts and others, may suffer by it. Resolutions of the Court. 1st. On the policy of the limitation.

II. That the infants and others contained in the exception, are such as have right at the time of the fine levied and no others. 2d Resolution

III. That the saving in favor of heirs (in the 4th section,) extended to heirs generally, whether over or under age of twenty-one, so as they pursued their right within the five years next after proclamations made. 3d Resolution

IV. That the five years commenced running upon the death of the ancestor of full age, and cannot admit of any intermission, but shall be accounted of the time of the 4th. Resolution, that the time of the

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limitation did
not stop run-
ning by the
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counted continually from the first day of them. That if an infant should have five years *de novo*, after his full age, the matter might possibly be delayed many hundred years, by death of one heir, and the descent to another under age, and so on; that the right would come to be tried when it was out of the memory of any man living, and yet in such a dark case, the jury would be under the necessity of giving a verdict; and such darkness and ignorance of the matters, would be the means of introducing perjury of witnesses and other mischiefs, which the legislature intended to prevent by removing the causes, by limiting a certain time for the first right which they did not intend should be exceeded, although some particular persons might suffer by it.

5th. That the time allowed by the statutes of limitation cannot be enlarged by any *equitable* construction.

V. That where an act limits a time, for the public repose of the realm, and in order to avoid universal trouble, such time ought not, either by exposition or equity, to be favored and enlarged for an infant, or any other, beyond the strict extent of the words; for the public repose is more to be regarded than the private convenience of any particular person; whether he be an infant, or of unsound mind, or in other degree.

6th. Statute having once commenced running, shall never cease to run till the bar is complete.

The disability within the proviso of the Statutes of limitation, must exist when the right of entry or cause of action accrues, and no subsequent disability can prevent the bar.

VI. That if a person having present right is under disabilities, and all are removed, the five years appointed shall commence, and if the person falls within a month after, into any of the defects or impediments mentioned in the statute, and so continues all the five years, or at the end of the first month of the five years dies, his heir within age, the five years before commenced, shall proceed, and non claim within the five years, shall bind the party and his heirs, as well as if he had been void of defects, or impediments during the whole five years.

And so judgment was given, that the demandant Stowell be barred.

The great and leading principle in this case is, that the disability within the proviso must exist when the right of entry, or cause of action, accrues, and that a subsequent disability is of no account to prevent the bar.

I have been thus particular in noticing the points argued and resolved, because the elaborate investigation which they received (for as Plowden tells us, each of the judges had a whole day for his argument, in the Exchequer Chamber,) and the profound learning and reasoning of the judges have so established the principle and incidental resolves, as that, from that time, they have been approved and followed in the exposition of the savings of all the statutes of limitation, as well in England as in the United States. To cite all the cases in which the case of Stowell vs. Zouch has been followed would be tedious; Chancellor Kent has referred to very many in the case of Wynkoop vs. Damerest.

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Wynkoop vs.
Damerest, by
Chancellor
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When, therefore, in 1812, the judges declared in the case of Beauchamp vs. Mudd, (2 Bibb, 538,) in applying the statute of limitations, "it is an established rule, that when the statute begins to run, it continues to run without interruption from the death of the claimant," they spoke, like Paul unto Festus, the language of soberness and truth. It was the established doctrine, as well in relation to the realty, as to the personalty.

Beauchamp
vs. Mudd
—When the
statute be-
gins to run,
it continues
without in-
terruption
from the
death of the
claimant.

In Machir vs. May &c. (4 Bibb, 43,) the doctrine is again recognized as well established in England, upon the construction of the British statute.

But it is supposed that there is a difference in substance between the import of the British statute and our own.

Comparison
of the statute
of England
and Ken-
tucky.

The British statute, (21 Jac. 1 c. 16,) enacts "that all writs of formedon in descender, formedon in reverter, and formedon in remainder, *hereafter* to be sued or brought, for any manors, lands, tenements, or hereditaments, whereunto any person or persons, now hath, or have any title, or cause to have, or pursue any such writ, shall be sued or taken within twenty years, next after the end of this present session of parliament; and after the said twenty years expired, no person or persons, or any of their heirs, shall have, or maintain any such writ, of, or for any of the said manors, lands, tenements or hereditaments; (2) and that all writs of formedon in de-

Statute of 21
James I, ch.
16.

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scender, formendon in remainder, formendon in reverter, of any manors, lands, tenements or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued or taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; (3) and that no person or persons, that now hath any right, or title of entry into any manors, lands, tenements, or hereditaments now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued; (4) and that no person or persons, shall at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his, or their right or title, which shall hereafter first descend or accrue to the same, and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding."

The proviso.

"II. Provided, nevertheless, that if any person or persons that is, or shall be, entitled to such writ or writs, or shall have such right or title of entry, be, or shall be, at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, feme covert, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons, and his and their heir and heirs, shall, or may, notwithstanding the said twenty years be expired, bring his action, or make his entry as he might have done before this act; so as such person and persons, or his or their heir and heirs, shall within ten years, next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue forth the same, and at no time after the said ten years."

Statute of
Kentucky of
1796.

Our statutes enacts, that "all writs of formedon in descender, remainder, or reversion of any lands, tenements or hereditaments whatsoever, hereafter

to be brought upon any title heretofore accrued, or which may hereafter fall or accrue, shall be sued out within twenty years, next after such title, or cause of action accrued, and not afterwards; (2) and that no person or persons, who now hath, or have, or may hereafter have any right or title of entry into any lands, tenements or hereditaments, shall make any entry, but within twenty years, next after such right or title accrued, and such person shall be barred from any entry afterwards."

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"Provided, nevertheless, That if any person or persons, entitled to such writ or writs, or to such right or title of entry as aforesaid, shall be, or were under the age of twenty years, *feme covert, non compos mentis*, imprisoned, or not within this Commonwealth at the time such right or title accrued or coming to them, every such person, and his or her heirs, shall or may, notwithstanding the said twenty years are, or shall be expired, bring and maintain his action, or make his entries within ten years, next after such disabilities removed, or death of the person so disabled, and not afterwards."

Proviso in the
Statute of
Kentucky.

It is said that the saving of the statute of James, applies so as to save only the right or title of entry, of those who were, or shall be infants &c. at the time when the said right or title first descended, accrued, come or fallen. But that our statute, by its saving, applies to those who were, or shall be infants &c. at the time when the said rights, or title accrued, or coming to them. And it is also, farther said, (in the case of *May vs. Machir*,) that "the saving in our statute, evidently relates to the time when the right accrues, or comes to those labouring under the disabilities therein mentioned, not to the time when the right first accrued to those under whom they derive their right; and to extend it to the latter only, would, therefore, be a plain and direct violation of the express words of the statutes."

Statement of
the distinction
taken between
the British and
Kentucky
Statutes.

To this exposition of the statute, my mind cannot assent. It would lead to this consequence, that if one having title in *fee simple*, should be quiescent for nineteen years, without entry or suit, against one

Apparent effect of the
case of
Machir &c.
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in adding dis-
ability upon
disability.

who had taken adverse possession, and should then die, his heir of non-age, the heir would take his right, in fee with a title and right of entry, not barred, the statute would cease running, and the heir being within the saving, would have ten years after his disability removed, which disability might be 19 years; but dying before the ten years were expired, viz: after twenty-eight years, from the descent to him, and forty-seven years after adverse possession against his ancestor, the heir would transmit the right to the estate, with a right of entry not tolled to his heir under disability, who might again die, transmitting the estate with a right of entry not barred, and so on, until all the inconveniences and mischiefs might arise, suggested in Stowell's case, and as was said by the chancellor in another case, "a right might travel through minorities for two centuries."

**Floyd's heirs
vs. Johnson
2 Littell 114
compared
with Machir
vs. May &c.**

This consequence is, however, avoided by the case of Floyd's heirs vs. Johnson, 2 Litt. 114, in a decision, upon the statute of limitations, which I think is correct; but which, without professing to overrule the cases of May vs. Machir, and Sentney vs. Overton, does to my mind, overturn the construction given in those cases. Mrs. Floyd was a *feme covert*, when her cause of action accrued, and died a *feme covert*, so the limitation never began to run against her, the right descended to her heirs all under disabilities, and they sued in less than ten years after their disability removed, but more than ten years after Mrs. Floyd's death. But they were barred, because the ten years had expired after the death of the ancestor before suit. In May's heirs vs. Machir, the twenty years had expired before suit, the adverse possession was taken against the ancestor, before his death, he was killed in March, 1790, the suit was commenced in May, 1813, upwards of twenty-three years after the death of the ancestor. The heirs were not confined to the ten years after the death of their ancestor; but were allowed ten years after their disability removed, to make their entry into the land, and to bring their ejectment. The statute ceased to run against May's heirs, because, said the court, the saving in our stat-

ule "evidently relates to the time when the right accrues, or comes to those laboring under the disabilities therein mentioned, and not to the time when the right first accrued, to those under whom they derive their right." In the two cases, May's heirs and Floyd's heirs sued after twenty years, and after ten years from the death of their ancestor, in less than ten years after their respective disabilities were removed; so far their cases were similar. The difference was, Mrs. Floyd was a *feme covert*, when the cause of action accrued to her, the statute never began to run against her. John May was under no disability, when the cause of action accrued to him, and the statute did begin to run against him. May's infant heirs were allowed ten years after their disability removed. The heirs of Mrs. Floyd were not allowed ten years after their disabilities removed, the court did not allow disability after disability, because they said, after reciting the proviso in the statute, "according to the plain and literal import of this language, the right is saved to the person himself, for ten years after the disability removed, or to his heirs after his death, and is forbidden to be exercised by his heir afterwards, without regard to his condition."

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This sentence standing by itself, (unqualified by the reference in the opinion to May ads. Machir, and Sentney vs. Overton,) contains, as I think, the true exposition of the statute, according to the import of the statute, and in accordance with the principles of the common law. If the ancestor mortgages the estate, the heir inherits subject to the mortgage. If the government imposes a tax with a lien for payment, the heir inherits subject to the tax and lien. If the ancestor is dispossessed, and the limitation begins to run against the ancestor, the heir inherits his right and title of entry, and action subject to the prescription to his ancestor. He inherits the estate *cum onere*. The person designated in the saving part of the statute, to whom, and to whose heirs the time is given, is the same person who is meant and described in the part which enacts the limitation. It is to a disabled person and his heirs, and not to disabled heirs that the saving

Argument, on the words of the Statute and proviso, against the construction in favor of the infant heir of the ousted ancestor.

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applies. The statute limits the time in which ejectments shall be brought, by limiting the time within which entry shall be made to twenty years, the cause of action arises by adverse possession, then the twenty years begins to be accounted, within which the party having right and title of entry, must make his entry, or bring his action. The clause enacting the prescription of twenty years is general. It designates the persons, by reference to them as having any right or title of entry, and prescribes, that this right and title of entry, shall be pursued within twenty years. Then comes the proviso, "that if any person or persons, entitled to such writ or writs, or such right or title of entry as aforesaid;" these words refer to the very same persons to whom the requisition and prescription had been addressed in the previous section, "shall be, or were under the age of twenty-one years &c." these words refer to the same persons alluded to in the section of limitation, "at the time such right or title accrued, or coming to them;" these words refer to the same persons, to the same writs, same entries, same rights and same actions described in the previous section of limitation; "at the time such right or title accrued or coming to them," do not shift the time of accrual or coming; to them the word "such," refers to those rights and titles mentioned in the section of limitation. The words "accrued or coming," the one in the past, the other in the future tense, are used, because the limitation is prescribed in the previous section, to persons having at the passage of the act, or who should thereafter have any right or title of entry. The limitations to writs of formedon, and to rights and titles of entry are all limited, by reference to those titles or causes of suits, existing or accrued, at the passage of the act, and to those thereafter to accrue. The words as to limitation of writs of formedon, are in reference to "any title heretofore accrued, or which may hereafter fall or accrue;" as to the possessory actions, the words are, "that no person or persons who now hath, or have, or may hereafter have any right or title of entry;" therefore, in the proviso, the saving is made in reference to causes of action ac-

arued at the passage of the act, and to causes of action thereafter to arise, so as to make the saving in cases of disability co-extensive with the limitations enacted. Causes of action existing and accrued at the passage of the act were limited to twenty years next, after the cause of action, as well as causes of action to accrue. The expressions "accrued or coming to them," were necessary in the saving clause, to meet the expressions, "heretofore accrued, or which may hereafter fall or accrue," and "now hath or have, or may hereafter have," in the limiting clause. "Accrued or coming to them," immediately follow, and are connected with the words, "at the time such right or title," and "them" refers to those alluded to in the previous section, whose actions are limited and prescribed in the clause for limitation of the actions. The words "such right or title," refer to, and mean rights and titles of formedon, and of entry, such as are described in the clause of limitation, and which are required to be prosecuted within twenty years next after such title or cause of action accrued or to accrue. Those rights or titles in the saving clause, are the rights and titles upon which the actions arise; the persons under disability, are such as are so at the time the cause of action accrued. The statute of James, in the limiting part, is distributed into four divisions, one for formedons accrued, two for those to accrue, three for rights and titles of entry accrued, four for those to accrue. In our statute the actions of formedon accrued, or to accrue, are thrown into one division, and the titles of entry accrued, and to accrue, are thrown into another, and all into one section, the proviso in another. The statute of James is more verbose than ours. Fines and recoveries were used in England to bar entails. The words "first descended &c," were introduced into the statute of Henry 4th, limiting the time, after fine with proclamations for entry, and suit to avoid the fine to five years, and have been preserved in their statutes and many copied from them. To those who are curious to learn in what possible cases of limitation, under the statute of land titles in England, those words were supposed proper, or useful to be intro-

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duced out of abundant caution, I recommend the case of *Stowell vs. Zouch*, for a commentary on those expressions. Certainly they can have no bearing in this controversy.

Objection to placing the infant heir of an ancestor, against whose right the Statute had never begun to run, (Floyd's heirs vs. Johnson,) in a worse condition than the infant heir of one against whom the limitation had commenced to run, (Machir vs. May &c.)

I can perceive no sufficient reason for placing the infant heir of an ancestor against whose right the limitation never commenced to run, in worse condition than the infant heir of an ancestor, against whose right the limitation had commenced to run. My opinion is, that the heir inherits the estate of the ancestor *cum onere*. I perceive sufficient reasons in the opinions of the judges in the case of *Stowell vs. Zouch*, and very many other cases against adding disability to disability, and sufficient reason against suffering the limitation, when running, from being broken and arrested by supervening disability. The enacting clause of our statute is general and without exception. The saving clause, as I think, applies only to such person as had the right or title of entry, or action, at the time when the cause of action accrued, and who then was under some disability and impediment to prosecute his rights; that to such person, so disabled, when the cause of action accrued, and to his heirs generally, whether disabled or not, the ten years are given; that the saving does not go lame upon one foot, making a difference between heirs under disability, and heirs under no disability. The question must always be, to whom the right of entry, or cause of action accrued, was he then under disability, if so, to him and his heirs, the saving is extended.

Objection against the distinction between the statute of James and our statute.

I perceive no difference between the statute of James and our own, which can justify a difference of construction, and departure from rules of limitation so well settled, and so long established.

Walden vs. Gratz Supreme court of the United States—against the distinction,

In the Supreme court of the United States, the supposed difference between our statute and the statute of James was urged in 1816, in the case of *Walden vs. the heirs of Gratz*, in a case depending on this statute, (1 Wheat. 296.) That court in their decision upon our statute, declared "its language does not vary essentially from the language of the statute of James, the construction of which has

been well settled, and it is to be construed as that, and all other acts of limitation founded on it, have been construed." The judgment was accordingly rendered in conformity to the construction which has been so long and so generally established.

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and according to the British decisions.

Cases since Machir vs. May, &c. and Sentney vs. Overton, not ruled on the principles those cases were decided on.

I am not unmindful of the mention made of the doctrine of the cases of Machir vs. May, and Sentney vs. Overton, in subsequent cases, particularly in Kendall vs. Slaughter, 1 Marsh. 376; May's heirs vs. Slaughter, 3 Marsh. 511; Haddix's heirs vs. Davidson, 3 Monroe, 42; M'Intire vs. Funk's heirs, 6 Litt. 34. In these cases, however, the rule of limitation in Machir vs. May, was not applied, but only noticed, like shoals and rocks on a mariners chart, looked to and avoided. These cases are not sufficient in my mind, to outweigh the great number of determinations, from the case of Stowell vs. Zouch, in 1569, to that of Walden vs. Gratz's heirs, in 1816. To argue against a former determination of this court, and the opinions of my associates is an unpleasant task. I have endeavored to perform what appears to me to be my duty, with becoming courtesy. Their perceptions are not mine, nor mine theirs. I have endeavored to restore what I think, is the plain meaning of the statute. I cannot consent to innovate upon a rule of limitation, which has been approved by the experience of more than two centuries, is founded in the wisest policy, adjudicated by a constellation of judges in successive generations, and so necessary and proper in quieting conflicting land claims, now, and in all time to come.

Insisted that the saving in statute refers to disabilities existing at the time the cause of action arose, not to the subsequent dissent.

The rule is, that the saving in the statute, refers to disabilities existing at the time when the cause of action arose; not to the time of the transmission of the right or title, from one to another. After disabilities, supervient, or cumulative weigh nothing.

My opinion is, that a new trial ought to have been granted.

Crittenden, for appellants; *Brown*, for appellees.

Tumey vs. Knox.

Case 11.

Error to the Mercer Circuit; WM. L. KELLY, Judge.

Evidence. Physicians. Res gesta. Slaves. Witnesses: Warranty.

April 21.

Chief Justice BRIDGES delivered the opinion of the Court.

Action for breach of the covenant of warranty of the soundness of a slave.

ON the 17th of July, 1822, Tumey sold a negro man slave to Knox, and made a bill of sale, containing a warranty, that the slave was sound, well and healthy. Shortly after the 18th October, 1822, the slave died; Knox sued on the covenant of warranty.

Declarations of the slave and the defendants, vendor, made whilst the slave was in his possession, given in evidence to prove his disease.

On the trial the plaintiff, to support the covenant of unsoundness, and breach of the warranty, introduced Mr. Durham, who occasionally bled in the neighborhood, and he was permitted, to detail what Mr. M'Ginnis, a former owner of the slave, had stated, about one or two years before the death of the slave, and also detail what the slave himself had stated, at the same time, to Mr. Durham, who had been sent for to bleed the negro then in bed; M'Ginnis stated, the negro had a cholic, and he was afraid he would die. What the negro stated as to his illness is not set forth, to this evidence, of what Mr. M'Ginnis had stated to Durham, and of what the negro stated to him, in relation to his illness, the defendant objected, but his objection was overruled.

Slaves statement to his physician.

The court also permitted Doctor Fleece, a witness for the plaintiff, to detail what the negro had told the Doctor, in relation to his complaint, when called to visit him about the 18th October, in his last illness, notwithstanding the objection of the defendant.

Opinion of the Chief Justice against the competency of the former owner

The Chief Justice, is of opinion, that if M'Ginnis knew any thing material to the cause of action, he ought to have been produced and examined as a witness. By what rule of evidence the declaration of M'Ginnis made to Durham, some twelve or twenty months before Tumey's sale to Knox, are to be imposed upon Tumey, is not perceived.

The general rule is, that the mere recital of a fact, the mere oral assertion by an individual, that a par-

ticular fact is true, cannot be received as evidence against another person, who is a stranger, not party, nor privy, not bound by the act of the individual who makes the assertion. It falls under the denomination of hearsay, which, as a general rule, is not evidence.

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The counsel, however, have argued for the plaintiff, that what M'Ginnis said, and what the negro said to Durham, who they say was *quasi* physician; (a kind neighbor, whose occupation or business is that of a farmer, is made a physician "*quoad hoc*," is to be taken as part of the *res gestæ*, and received like the attendant's and patient's declaration to a physician, as to the symptoms of the disease. The physician may be assisted by the attendant and patient to ascertain the disease; but at last the credit is given to the physician's skill and judgment, in pronouncing upon the symptoms compared with the declarations of the patient and attendants. The cases of that description have stretched the rule of evidence as far, and perhaps a little farther, than it will well bear. But to convert Mr. Durham into a physician, would be contrary to the evidence.

Chief Justice against the declarations of the slave.

Before we give into the effect of the term *res gestæ*, as used in this case, we must look into its meaning. *Res gestæ*, means a fact done, or transaction, or thing past. Before we admit declarations as part of the *res gestæ*, it is necessary to show the relation and connexion of the fact, with the controversy. If the fact itself, which is the principal, has no tendency to illustrate the question of dispute between the parties, if the principal fact is not evidence, the declarations relating to that fact, as part of the *res gestæ*, cannot be admitted as evidence.

Definition of the *res gestæ* and where evidence.

The declarations of the bankrupt, where the intent with which he left his house, enters into the character of the act itself, which is in dispute, so as to determine the question of bankruptcy or not; the cry of the mob in Lord George Gordon's case; the entry made in the book, in the case of Digby vs. Stedman, and Lord Torrington's case, 1 Salk. 285, are examples of declarations or entries, admitted as part of the *res gestæ*, as facts connected with, and

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forming a part of the transaction under investigation. So the declarations of tenants, as to who was the landlord under whom they entered, or under what title they entered, or the declaration of a person making an entry, as to the deed, claim or title, under which he made the entry, are admitted as part of the *res gesta*, to explain the nature of the possession, whether hostile or amicable, or the extent of that possession.

All these declarations are admitted as part of the transaction, as tending to elucidate the facts with which they are connected, as the facts themselves are proper evidence as to the matters in dispute.

Parties and
privies.

It must be likewise remembered, that to bind a man by the acts or declarations of another, he must be party or privy to the act or declaration of that other, it becomes evidence against him, by his own conduct or assent, presumed from the relation, or connection he has assented to have with that other. But where he is entirely a stranger to the acts or declarations of another, those cannot affect him, because they afford no presumption or inference against him, as founded on his own conduct or admission. *Res inter alios acta* is not evidence, it affords no presumption against him in the way of admission or otherwise. And it falls under the general rule, that no man can be bound by the acts, or concluded by the declarations of others, or by their assertions, to which he was in no wise privy. So to bind him is, *in the general*, contrary to the first principles of justice, in violation of the fundamental principle of evidence, that it is to be verified and sanctioned by the oath of the witness or declarant. Exceptions to these fundamental principles must be received with great caution. The exceptions to these rules are such, as to guard against abuse, by resting the credit of the declaration or assertion, not upon the credit of the individual who makes it, but upon its connection with circumstances, which from experience in the affairs of men, may be relied on as free from danger, and are commixed moreover with considerations of public utility and necessity.

All these exceptions, by which declarations not upon oath, are admitted in place of declarations upon oath, are received, however, upon the supposition, that the declarants, were worthy of credit if alive, or under no objections as to competency; that they are acknowledged by the law as witnesses against the body of society, capable of historical truth, witnesses as to the general current of events, depositaries of facts, to be believed in tradition and matters of reputation, although not always competent witnesses, as to the very point in issue.

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Where declarations not on oath may be evidence.

Slaves are not witnesses by our laws against the body of society; they are witnesses only against, or for negroes or mulattoes. To receive the declaration or assertion of a slave, against a party, for or against whom, not even his testimony upon oath, in the most solemn form and manner known to the law, would or could have been received, would be to undermine the statute, to reject the substance and be cheated by the shadow. The prohibition in the statute, that no negro or mulatto shall be a witness, except in cases where negroes or mulattoes alone are concerned, is the exclusion of all testimony arising from such a source, inferior and subordinate, as well as direct and positive—the declarations of slaves cannot be admitted as evidence.

Slaves not competent witnesses except for or against negroes and mulattos, hence their declarations are never competent evidence against others

Can it be said, with legal propriety, that Tumeys, by the purchase and sale of slave Sam, had made himself party, or privy, and consented by implication to the declarations of Sam, during the ownership of his former master M'Ginnis, or his future master Knox? Did this act of purchase and sale emancipate his mind, purify his morals, elevate his character and condition, and repeal the law in relation to the evidence of slaves? The fact in issue, was the soundness, or unsoundness of negro Sam at the time of the sale by Tumeys to Knox. Was Sam a witness in law capable to testify on oath, or declare not on oath, as to the truth of the fact in issue? The question in issue, was the soundness or unsoundness of negro Sam, at the time of the sale and warranty of the 17th July, 1822, by Tumeys to Knox. Suppose the sale had been made by an agent

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of TumeY. Then declarations made by the agent at the time, might be given in evidence as part of the *res gesta*. But the declarations of the agent made some two years before the sale, or some days after the sale, would not be evidence, they would not be any part of the *res gesta*. Much less can the declarations of M'Ginnis and of Sain, some two years before, and of the negro Sam some days after, be a part of the *res gesta*, as between TumeY and Knox. Neither M'Ginnis nor Sam, nor Doctor Fleece, were the agents of TumeY.

Judge Ows-
ley's opinion.

Judge Owsley, however, is of opinion, that the declarations in the bill of exceptions as stated, and considering the facts in issue, might be given in evidence upon the question, whether Sam had, or had not a continued disease from the time that M'Ginnis bled him, till he was attended by Doctor Fleece; that the question involved, at each period, is the nature and character of the disease under which Sam labored each time, and that his own declarations at those times, as to the afflictions and pains he felt are parts of the *res gesta* at those times.

Judge Mills'
opinion.

Judge Mills is of opinion, that the declarations in question were not proper; but thinks the declaration of a slave may, in some cases, constitute a part of the *res gesta*, and be proper to be given in evidence, and as the opinion of a physician or surgeon, may sometimes be given in evidence, whether the disease was of a temporary or chronic character, and that opinion is often based on his examination of his patient, combined with other circumstances, it might be competent for the physician to detail the reasons for his opinion combined with his examination. But is not willing to go further in admitting the declarations of either M'Ginnis or the slave made, to another who does not profess any medical skill, which is necessary to make his opinion competent.

The Chief Justice expresses his opinion for excluding the declaration of a slave in all cases.

Judgment of
the court.

These opinions of the judges, however, operating on the questions in this cause, produce a reversal.

It is, therefore, considered by the court, (Judge **TUMLEY** ^{vs.} **Owsley** dissenting,) that the judgment of the circuit court be reversed, and that the cause be remanded for another trial, in which the declarations of M'Ginnis, and of the slave, to Durham, in the bill of exceptions alluded to, are to be excluded. **KNOX.**

Plaintiff in this court to recover his costs.

Robertson and Daviess, for plaintiff; *Green*, for defendant.

Ward vs. Bank of Kentucky.

DEBT.

Error to the Greenup Circuit; W. P. **ROPER**, Judge.

Case 12.

Powers of attorney. Promissory notes. Custom of Merchants. Banks.

Chief Justice **BIBB** delivered the Opinion of the Court.

April 21.

ON the 8th of December, 1821, James Ward executed a power of attorney, and on the 21st of December, 1821, Thompson Ward executed a power of attorney, each signed and sealed, and are in the same words (*mutatis mutandis*;) the recital of one, shows the power given by the other.

"Know all men by these presents, that I do hereby authorize and empower brother Abraham Ward to sign my name to any note, or notes, offered by the said Abraham Ward, to the Bank of Kentucky for discount, for his benefit, to any amount not exceeding three thousand dollars, which power may be used by the said Abraham, either in the principal Bank, or any of its branches, whose acts and deeds in the premises shall be as binding, as though I had done the same myself."

Power of attorney.

The Bank sued James and Thompson Ward, the surviving obligors, upon a note executed by Abraham Ward, and in the name of said Thompson and James, by said Abraham as their attorney, as follows:

"\$2880. We Abraham Ward principal, and Thompson Ward, and James Ward, jr. securities, or either of us, promise to pay the President, Direc-

Note sued on.

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tors & Co. of the Bank of Kentucky, the sum of twenty-eight hundred and eighty dollars, sixty days after date, for value received, June 3, 1823."

Judgment of
circuit court.

To this, the defendants pleaded *non est factum*, and upon an agreed case, the law and fact was submitted to the court, and judgment rendered thereon for the plaintiff.

Facts agreed.

The facts agreed, show that Abraham Ward, for himself, and as attorney for his brothers, executed from time to time eighteen notes, in the form before given, each note, payable at sixty days after date, viz:

| | | |
|------------------|-----------------------|--|
| { No. 1, \$ 500, | date, 22 Jan'y. 1822, | due 23—26 March. |
| { No. 2, 1000, | " 8 Feb'y. 1822, | " 9—12 April. |
| { No. 3, 1000, | " 8 March, 1822, | " 7—10 May. |
| { No. 4, 500, | " 26 March, 1822, | " 26—28 May. |
| { No. 5, \$1500, | " 5 April, 1822, | " 4—7 June. |
| { No. 6, 500, | " 10 May, 1822, | " 9—12 July. |
| { No. 7, 500, | " 28 May, 1822, | " 27—30 July. |
| { No. 8, 1500, | " 28 May, 1822, | " 28—30 July. |
| { No. 9, \$ 500, | " 12 July, 1822, | " 10—13 Sept. |
| { No. 10, 1000, | " 12 July, 1822, | " 10—13 Sept. |
| { No. 11, 2000, | " 12 July, 1822, | " 10—13 Sept. |
| No. 12, 2500, | " 13 Sept. 1822, | " 12—15 Nov. |
| No. 13, 2500, | " 15 Nov. 1822, | " 14—17 Jan. 1823. |
| { No. 14, 500, | " 3 Dec. 1822, | " 1—4 Feb. 1823. |
| { No. 15, 2500, | " 17 Jan. 1823, | " 13—21 Mar. " |
| { No. 16, 500, | " 28 Jan. 1823, | " 29 Mar. 1 April, " |
| No. 17, 2940, | " 1 April, 1823, | " 31 May, 1 June, " |
| No. 18, 2880, | " 3 June, 1823, | " 2—5 August, this last the note sued on. |

It appears by the statement of the evidence submitted, that

- No. 4. was executed for the renewal of No. 1.
- No. 5. was executed for the renewal of No. 2. and the excess for A. Ward's accommodation.
- No. 6. was for the renewal of No. 3.
- No. 7. was for the renewal of No. 4.
- No. 8. was for the renewal of No. 5.
- No. 9. was for the renewal of No. 6.
- No. 10. was for the renewal of No. 7. the excess for A. Ward's accommodation.
- No. 11. was for the renewal of No. 8 and 9.
- No. 12. was for the renewal of No. 10 and 11, the deficiency of 500 dollars, paid by A. Ward.
- No. 13. was for the renewal of No. 12.
- No. 14. was for the accommodation of Abraham Ward.
- No. 15. was for the renewal of No. 13.
- No. 16. was for the renewal of No. 14.
- No. 17. was for the renewal of No. 15 and 16.
- No. 18. was for the renewal of No. 17.

It appears, therefore, that when the note No. 4, WARD
VS.
BANK OF KY. was executed on the 26th March, 1822, Abraham Ward had executed notes to the amount of the limit of \$3000; but No. 4, being discounted for the renewal of No. 1, the Bank had a debt against Abraham, James and Thompson Ward, of two thousand five hundred dollars, which is short of the limit. But upon the execution and discount of No. 5, for renewal of No. 2, of \$1000, and the balance of \$500, for Abraham's accommodation, the Bank then held, viz: on the 5th April, 1822, debts by notes, No. 3, 4 and 5, amounting to \$2,500. But on the 12th July, No. 9 was discounted for the renewal of No. 6, of \$500; No. 10, was discounted for the renewal of No. 7, of 500, due 27 and 30 July, and the balance of \$500, for the accommodation of Abraham Ward, and on the same day, No. 11, was discounted, bearing date on the 12th July, for \$2000, the renewal of No. 8 and 9. It is to be remarked, that No. 9, 10 and 11, are each dated on the 12th of July, 1822, and each payable on the 10 and 13 September, these three notes, so dated on the same day, and payable on the same day, amount to \$3,500; but waiving the note, No. 9, the other two notes of this date, No. 10 and 11, were held for renewal of No. 7, 8 and 9, and for accommodation granted, of \$500, loaned to Abraham Ward; so that on the 12th July, the Bank did hold and claim debts to the amount of \$3000, by notes 10 and 11. When the notes discounted on the 12th July, fell due on the 13th September, Abraham Ward reduced his debt in Bank to \$2,500, by getting No. 12, discounted for that amount, for renewal of No. 10 and 11, and by paying up the balance due, of No. 10 and 12. On the 3rd December, 1822, the accommodation of Abraham Ward, was again increased to \$3000, by discount of No. 14 due 1 and 4 February, the Bank then holding No. 14, for \$2,500, due 14 and 17 July, 1823.

The Bank claims that Abraham Ward had power under the letters of attorney, to bind James and Thompson Ward by exchange of notes, renewals, Argument for
the Bank.

MONROE'S REPORTS.

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swelling and diminishing his debt to the Bank, from time to time, so as the debt, at no one time, exceeded three thousand dollars.

Power to an attorney to execute promissory notes for discount at Bank to a certain amount, does not authorize the renewal of said notes.

This court cannot assent to such construction of the letters of attorney. They did not confer a continuing maintaining power to exchange notes, prolong the time of payment, and raise the debt up to the limit of three thousand dollars, after it had been in part paid, and reduced below the limit. If the intent had been to confer the power of renewing notes from time to time, and after any reduction of the debt below the limit to execute others for borrowing again, to keep a continuing never ending debt in Bank, so as not to exceed at one time three thousand dollars, other words than those employed, were necessary to concede such powers. As expressed, the letters conferred authority on the attorney to execute a note or notes to the amount of three thousand dollars, when such note or notes were once executed and delivered, the power was executed and ceased. A power to sign a note or notes, and bind the party to any amount, not exceeding three thousand dollars, cannot authorize the execution and delivery of notes to the amount of twenty four thousand dollars.

Effect of the custom of merchants here in their transactions in the Bank — by Judge Mills.

To this construction of the power, Judge Mills does not assent, although he deems it correct as to ordinary transactions. But he conceives, that in banking transactions, which are generally ruled by the law merchant, where the custom or practice gives the law of the case, a more liberal construction ought to be given, and that the authorities in mercantile transactions warrant it.

It seems to this court, Judge Mills dissenting, that upon the facts stated and agreed, the law is for the defendants in the court below. It is, therefore, considered by this court, that the judgment of the circuit court be reversed, and that the case be remanded to that court, with direction to enter judgment for the defendants.

Plaintiffs in this court to recover their costs.

Mayer and *M Connell*, for plaintiffs; *Crittenden* for defendants.

Forsyth vs. Kreakbaum.

DETINUE.

Error to the Jessamine Circuit; WILL. L. KELLY, Judge.

Case 13.

Infants. Guardians. Gifts. Delivery. Possession. Statutes. Frauds.

Judge MILLS delivered the Opinion of the Court.

April 21.

Detinue for slaves.

THIS is a verdict and judgment for the defendant, in an action of detinue for slaves, and the plaintiff has prosecuted this writ of error to reverse it, because of various supposed errors in the instructions and decisions of the court below, delivered in the progress of the trial.

The circumstances are these:

In the year 1803, Isaac Forsyth intermarried with Nancy, the daughter of Michael Litton, and afterwards resided at a distance from him, both residing in the State of Maryland. In the latter part of 1804, Forsyth and his wife, made a visit to her father, having with them the plaintiff, Evelina Forsyth, a child of the marriage, then a few months old. The father who was in easy circumstances, and in the habit of advancing his children in slaves, and of presenting a slave to each of his grand children, during the visit, gave to Forsyth himself, two slaves, and also, presented to Evelina, his infant grand child, an infant slave, then between four and six years of age, and delivered her to the father of Evelina, to be kept and raised by him, along with his child, as her natural guardian.

Gift of the slave by the grandfather to his infant grandchild.

Forsyth took the slave home with him accordingly, and afterwards, in the winter 1805-6, removed from Maryland to Kentucky, and brought with him his daughter Evelina, and the slave presented to her by her grandfather, with the rest of his family, and settled in the county of Bourbon.

In the year 1811, Forsyth, being a man of bad habits, and having caused some fears, that he might go through his estate, and leave his family in want, executed to Caleb Litton, a bother-in-law, a conveyance of sundry slaves and personal estate, in trust for the exclusive use of his wife Nancy and children, and after her death to go to her children. The

Forsyth's deed of trust for use of his wife and children.

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slave given by the grandfather to his daughter Evelina, was not one of those conveyed in trust for his wife and family, but in the same deed, there is the following paragraph:

Clause in
Forsyth's
deed of trust
in relation to
his daughter's
slave in ques-
tion.

"And whereas, Michael Litton, father of the said Nancy, (the wife,) in the State of Maryland, did, by deed of gift, grant and convey to Evelina Forsyth, daughter of the said Isaac, and daughter of the said Nancy, one negro girl slave, named Anne, aged at this time, about ten years old, and the said Evelina is yet under the age of twenty-one years, and the said Isaac Forsyth, by virtue of the guardianship, to which he is entitled over said child Evelina, has still had the keeping, maintainance and benefit of said slave. Now the said Isaac, the more effectually to acknowledge the ownership of said Evelina, and to secure her in the use of said negro girl, doth hereby bargain, sell and convey, to the said Caleb Litton, all his right and title of, in or to said negro girl, Anne, and all right with which he may be vested, to the custody, use and benefit thereof, and all the interest which he might have therein, in trust to be held and kept by him, for the benefit and use of the said Evelina, till she, the said Evelina, shall marry or arrive at the age of twenty-one years, or until, by the death of said Evelina, the said property shall go to her heirs by the ordinary legal course of descent. And in case of the marriage, or arrival at the age of twenty-one years, of the said Evelina, the property of the said girl is to be delivered, and go to her absolute ownership and control."

This deed was duly sealed, executed, acknowledged and recorded on the day it bears date, in the clerk's office of Bourbon county, where all the parties resided.

Forsyth sells
the slave, and
Kreakbaum
becomes the
purchaser.

After this deed, the trustee still let the said slave Anne, remain in the possession of Forsyth, till on the 14th of July, 1813, Forsyth sold her as his own, for a fair price, to Greenbery Spiers, and executed to him a bill of sale with warranty. Spiers afterwards sold the said slave to Kreakbaum, the present defendant, against whom this action was brought for

the said slave and her children, shortly after it was discovered where the slave was, as she was found in Jessamine, and the sale to Spiers was made in Fayette.

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The court below instructed the jury:

Instructions
of the circuit
court.

I. That if the slave in contest was proven to have been upwards of five years in the peaceable and undisturbed possession of Isaac Forsyth, claimed as his own property, she was liable to the payment of his debts, and a sale by him to a *bona fide* purchaser was valid.

II. That the recital in the deed of trust aforesaid, of a pretended bill of sale, or deed of gift from Michael Litton, to the plaintiff, was no evidence of such sale or gift, and passed no title to the plaintiff.

III. That the gift from Michael Litton to the plaintiff was void, as to the defendant, unless possession was delivered at the time of the gift, and such possession remained with the plaintiff.

We cannot perceive on what principle the first instruction can be supported. It is in the teeth of the decision of this court, in the case of *Kenningham vs. M'Laughlin*, 3 Monroe, 30, which is precisely analogous to the present case, except that was a controversy between the infant donee of the grandfather, and the creditors of the father, and this with a purchase from the father. All our statutes to prevent frauds in the gifts, or loans, or sales of slaves, always contemplate and provide against the frauds of the donor or donee, vendor and vendee, or the borrower and lender. But they where lay the estate liable to the debts of either, where it is held by one of them, as the natural guardian, or fiduciary, of a third party, who has made no sales or loans, or contracted no debts to be defrauded. It would be a merciless act of the law to deprive an infant of possession, and declare him or her incapable of managing the estate, and for this cause to assign this possession to another, and afterwards make it a fraud in the infant, for permitting that possession, and to subject the estate either to the debts or sales of him, to whom the law confided the possession,

Father's possession of his infant child's property as natural guardian, does not subject it to his creditors, nor make his sale of it effectual against the child.

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barely because he had the possession. In such case the possession of the father, is the possession of the child. Here the father, or natural guardian, was neither the borrower nor lender, nor donee or grantee of the grandfather, and the grandfather's debts, or purchasers from him, are not in question.

Declarations of the vendor of a party, made before the sale, or the recital in the deed such vendor had executed, are competent evidence against his vendee.

The court admitted the subsequent and frequent parol acknowledgements of Forsyth, after the gift to his daughter, and before he sold the slave, that the slave was not his, to be given in evidence. Such evidence was proper, and the defendant claiming under Forsyth, was bound by his acts and acknowledgments before the sale. We cannot, therefore, see, why the recital in the deed of trust was not evidence of a still more high and unerring character, and as strong as could well be given, that he had not. but that his daughter had title, derived by gift from the grandfather. It was an error therefore, to say, that the recital and provision in the deed of trust, being a most solemn act of Forsyth, did not prove the facts which it contains, as stated in the second instruction.

It seems the statute against fraudulent gifts, does not apply to transactions without the state.

As to the third instruction, it is not more tenable. It is shaped to fit the provisions of the statute of this country, relative to gifts of this character, where possession does not go to the donee at the time of the gift, and it seems to have been forgotten that this gift was in Maryland, where our statute does not operate.

Where a slave is delivered to the father of the infant donee, or the child, the possession does follow the gift, as required by the statute.

Moreover, if the statute could have effect, the instruction had no application to the case. For there was no evidence but what proved possession following the gift, if, as we have already said, the possession of the father as guardian, was the possession of the child. Besides, the latter clause of the instruction, seems to suppose, that the personal possession of the plaintiff was necessary, when the law did not allow her to hold, or manage it, and it excludes the possession of the father, as her possession. How the infant was to hold possession, except by her guardian, we are at a loss to know, and as all the evidence conduced to show such a possession, the last clause of this instruction was as erroneous as the first.

Judgment reversed with costs, verdict set aside, **FORSYTH**
and cause remanded for new proceedings not incon- **VS.**
sistent with this opinion. **KREAKBAUM**

1. *Chinn and Loughborough*, for plaintiff.

Logan vs. Steele's heirs.

EJECTMENT.

Error to the Fayette Circuit; **JESSE BLEDSOE**, Judge.

Case 14.

Landlord and Tenant. Estoppel. Vendor and vendee.
Decrees. Evidence. Conveyances. Merger of titles,
Warranty.

Judge **MILLS** delivered the Opinion of the Court.

April 21.

LOGAN brought his ejectment against **Moore** as tenant in possession, and the heirs of **Richard Steele** entered themselves defendants, for, and with **Moore** their tenant.

Ejectment by
Logan a-
gainst **Moore**
and **Steele**,
his landlord.

On the trial, **Logan** gave in evidence a patent from the Commonwealth to **Hugh Thompson**, and a conveyance from **Thompson** to **Lewis Craig**, for 171 acres thereof, and a conveyance from **Lewis Craig** and others to himself, dated November 16th, 1799, embracing, not only the 171 acres aforesaid, but adjoining lands, amounting in the whole, to 520 acres; the patent of a certain **Joseph M'Nitt**, having interfered with the patent of **Thompson**, to the extent of the 171 acres, and **Craig** having united in himself both patents on that ground, before he conveyed to **Logan**, **Thompson's** patent being the oldest.

Plaintiff's title.

He next gave in evidence, an article of agreement between himself and **Richard Steele**, by the provisions of which, he sold 100 acres, part of the said 171 acres, to **Steele**, part of the price of which was paid, and the rest appeared to remain due. This article is dated, October 7th, 1801. **Steele** entered and received the possession from **Logan** under this purchase, and resided thereon till his death, having previously made a will, in which he devised the 100 acres to his widow for life; and from her it

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HEIRS

came to the possession of her children, who were the heirs of Richard Steele, who had placed the present tenant, Moore, in possession.

During the tenancy of Mrs. Steele, the widow, under the will of her late husband, she brought her bill in equity, against Logan for a conveyance, which he resisted, by showing that the purchase money was not paid, and her bill was ultimately discontinued. The foregoing were the facts and title on which Logan relied for a recovery.

Title of the
defendant.

The defendants then gave in evidence, a deed of conveyance of the same land, dated the 14th day of June, 1803, from Logan to James M'Chord of Pennsylvania.

Record of the
case of B. M'
Nitt vs. Lo-
gan, given in
evidence.

They next gave in evidence the record of a suit in chancery, from the general court of this State, Barnard M'Nitt against said Logan, for the same land, in which the bill claimed it under Joseph M'Nitt's patent, because Barnard was the true heir of the original owner of the pre-emption, instead of Joseph, under whom Logan held, and because the patent issued wrongfully to said Joseph. This bill, the General Court dismissed, but on the appeal of B. M'Nitt the complainant, this court reversed that decree, and decided that B. M'Nitt was entitled to recover the land, and directed a decree in conformity thereto, in the General Court. This is the same opinion and decree of this court, reported in Littell's select cases, 60. After the return of the cause to the General Court, that court proceeded to effluatuate the opinion and mandate of this, by preparatory steps and a final decree; from which, Logan, being dissatisfied, appealed, and the decree of the General Court was affirmed, and this is the case reported in Littell's select cases, 119. The decree so affirmed, directed Logan to convey about 540 acres, including the one hundred now in contest, to the said Barnard M'Nitt. Logan failed to convey, and the General Court, at their January term, 1816, appointed a commissioner to convey the land for him, and the commissioner, at the same term, reported a deed of conveyance, pursuant to the decree, and containing a warranty therein, on behalf of Logan, a-

himself, and all claiming under him; and said conveyance was regularly acknowledged by the commissioner, and ordered to record by the court.

LOGAN
VS.
STEELE'S
HEIRS.

The defendants next gave in evidence, the record of a suit in chancery of the Franklin circuit court, wherein the heirs of Richard Steele were complainants, and Barnard M'Nitt and said David Logan were defendants, in which said heirs claim a conveyance of the same land, either from M'Nitt or Logan, in whichsoever the legal title might be, by a virtue of a contract made between said Richard Steele their ancestor, and Barnard M'Nitt. In this suit, David Logan answered, resisting their claim, and against Barnard M'Nitt, the complainants, proceeded by publication, as a non-resident. At the trial of that cause the complainants dismissed their bill as to Logan, because, as the record says, it appeared that Logan, by the aforesaid commissioner, in the General Court, had conveyed his title to Barnard M'Nitt. But against M'Nitt they proceeded by default, and obtained a decree, directing him to convey the land to them. A commissioner was appointed, who conveyed the land from M'Nitt to them accordingly. They also gave other evidence, conducing to show, that Richard Steele in his lifetime, and his heirs since his death, at the expiration of the tenancy of their mother, held the land adversely under the claim of said Barnard M'Nitt.

Case of
Steele's heirs
against B.
M'Nitt and D
Logan.

To these records Logan made no other reply, than objecting to the admission of them, as improper and irrelevant evidence. But the court overruled the objection, and he excepted.

Objection to
the records
and excep-
tion.

To rebut the evidence of the conveyance, which he had made to M'Chord, in 1803, he gave in evidence a re-conveyance from M'Chord to himself, dated May 22nd, 1815.

M'Chord's re-
conveyance
to Logan.

On this evidence, the counsel for Logan moved the court to instruct the jury in substance, that if they found that Logan sold to, and put Richard Steele into possession, under the sale evidenced by the article of agreement aforesaid, and that Moore was tenant to his widow during her life, and after

Instructions.

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HEIRS

her death, to her and Richard Steele's heirs, and that the patent to Thompson, and his conveyance to Craig, and from Craig to Logan, covered the land, the records offered by the defendants did not prevent the lessor of the plaintiff from recovering. But the court overruled the motion, and instructed the jury, that the decree and the commissioner's deed, made in pursuance thereof, did preclude the plaintiff from recovering.

The jury found for the defendants accordingly; and Logan has appealed, and complains in this court, that these decisions of the court below were erroneous.

Question stated.

The first point that presents itself in reviewing the decisions of the inferior court, is, the right of Steele's heirs to question the title of Logan, as their ancestor was a purchaser from, and took possession under him, by an executory contract.

Tenant cannot gainsay the landlord's title.

It is a well settled general rule, that when the relation of landlord and tenant has existed between the plaintiff and defendant in an ejectment, the tenant cannot gainsay the landlord's title, and set up an outstanding title, existing either in himself or others.

Where the tenant obtains a decree against the landlord, for the title, he is absolved from his fealty & may deny the title he entered under

But this rule has been held by this court flexible to circumstances, as in the case of *Swan vs. Wilson*, 1 Marshall, 99, where the tenant had gotten a decree against the landlord, for the title to be conveyed to him on some existing equity between them. This decree was held sufficient, so far to destroy the relation of landlord and tenant, as to absolve the tenant from his fealty, and permit him to show a superior title out of the landlord.

One who obtains possession under an existing contract, cannot deny the title of his vendor.

Blight's heirs vs. Rochester

The same doctrine of estoppel to question the title of the plaintiff on part of the defendant, has been applied in this court, to a tenant holding by virtue of an executory contract, who had received possession from the plaintiff. Such is the case of *Connelly's heirs vs. Chiles &c.* 2 Marsh. 242. And although this case has been complained of as obscure, by the Supreme Court of the United States, in the case of *Blight vs. Rochester*, 7 Wheat. 550, yet

it is easily understood by us, and its principles admitted, and not overthrown by the case of Blight vs. Rochester.

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This is a summary of the case. Hays sold to Connelly, gave his bond with surety to convey, and gave him the possession of the land. Connelly took possession of the land and enjoyed it long, no conveyance having been made, till long after the bond forfeited by a breach in not conveying. Connelly, sued Hays, or rather his surety, on this breach, and recovered, and received the full value of the land. Hays's heirs brought their ejectment against Connelly, or his heirs, to regain from them the possession which Connelly had received from their ancestor, especially as Connelly had completely rescinded the contract and recovered the price. He was in this situation bound to restore the land. Connelly's heirs set up an outstanding title, which existed when their ancestor had bought of Hays, and under which Connelly had taken protection, after the recovery back of the value of the land from the surety of Hays. Connelly or his heirs were held to be estopped to set up this outstanding title, or to question the title of Hays, under which he had taken possession.

Vendee by executory contract, after recovering at law for vendor's failure to convey, must surrender the possession, and cannot protect himself by an outstanding title

The question then is, does that case govern the present? We conceive not. There are circumstances in this case, which distinguish it from that, and authorize a different decision.

In the first case, Logan himself, had disaffirmed his contract with Steele, and destroyed the relation of vendor and vendee between them, by conveying the same land to M'Chord in 1803, which he had contracted to convey to Steele in 1800. From that moment Steele could treat him as a stranger, and was no longer bound to look to him for a title, or to hold the possession for, or under him. If Steele wished a conveyance, he must go to M'Chord, and not to Logan. If he wished to rescind the contract and restore the possession, he was bound to restore to M'Chord, who was then clothed with the rights of Logan. This fact, if no other existed, fully

Vendee in possession, whose vendor conveys to another in violation of his contract, is absolved, and may deny the title he entered under, and purchase and defend under any other claim.

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HEIRS

Decree for
the title and
possession a-
gainst the
vendor by ar-
ticles, dis-
solves the re-
lation, and
absolves the
vendee in
possession
from all fur-
ther duties.

warranted the defendants here to question the title of Logan.

But if this conveyance of the land to M'Chord, was out of the question, and Logan had ever since his sale to Steele, continued to hold the title himself, there is another important circumstance here, which fully authorizes the defendants to question the title of Logan, and that is the decree of the general court, directing Logan to convey his title to Barnard M'Nitt. This was a real controversy, commenced in the year 1803. At what time the process was served on Logan, does not appear from the record, as the process is mislaid; but Logan answered, and the issue was made up in 1804, and in 1808 this court determined that B. M'Nitt was entitled to the land, and shortly afterwards the general court effectuated that determination. It is immaterial whether that suit was prosecuted in the name of M'Nitt for the benefit of Steele, as some parts of this record would seem to prove, or whether Steele was a stranger to it, and in no other manner privy, than as a purchaser by executory contract from Logan. It directed the title of Logan, instead of going to Steele, as Logan had covenanted it should, to go to M'Nitt, by virtue of a paramount equity, and whether rightfully or not, at this day, is wholly immaterial. From the date of that decree, as was well observed in argument, Steele was absolved from all duties to Logan, and the relation between the two as vendor and vendee was dissolved, and Steele was at liberty to say, that Logan was not the one to whom he was to look for title, or to whom he was bound to restore the possession, as that possession was decreed to another, by a judicial sentence obligatory on Logan.

Record of
such a decree
is competent
evidence in
an ejectment
by vendor vs.
vendee.

On the question whether these records ought to have been rejected, there can be no doubt that the record of M'Nitt vs. Logan was properly admitted. If Logan could give the act of a conveyance from Craig to himself in evidence, to operate on the rights of the defendants, they consequently could give in evidence, any conveyance from Logan to others, or a judicial determination directing Logan to convey

to others. If a conveyance from a stranger could give Logan a title, so a conveyance from him to a stranger, or directed to be made to a stranger by an irreversible decree, could remove the estoppel to question Logan's title.

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HEIRS.

As to the record of Steele's heirs against M'Nitt, there are various objections made to it in argument, which are formidable, and must have been decided, if the court below, after admitting it, had instructed the jury that it passed any title. But as the case is presented, there is no necessity of deciding, whether that record did, or did not, strip M'Nitt of the title, or whether Steele's heirs took nothing by it. For if it be conceded, (without deciding the question,) that this decree is void, as well as the title made under it by the commissioner, still it might be given in evidence to show how Steele claimed to hold. We have seen that he was at liberty, after certain events, to hold adversely to Logan, and to question his title, and this decree and deed, though void, might be used to prove that he actually did so. It was an attempt to get a title, on which the representatives of Steele might place confidence, although it deserved none. On the same principle, a void title may be given in evidence to show extent of claim, and that the possession is adverse when the statute of limitations is concerned, and length of possession gives title, though the deed does not, and the statute operates as an estoppel to question the validity of the deed. Indeed, to sanction such titles is the object of the act. For he that has a valid title needs to bar no protect him.

Void decree and deed may be given in evidence to prove how a party held and the extent of his claim.

The remaining question is, the effect of those records, as the court below decided that they were conclusive against the plaintiff.

Effect of the conveyance by a commissioner under a decree is the same as of deed made by the party according to the decree.

We perceive no objection to this decision. The decree and the commissioner's deed, which seems to have been made in conformity thereto, were documents of a high grade of evidence, and on which the court could decide. The conveyance by the commissioner ought to be construed to do what Logan himself ought to have done, in obedience to the decree, as the act of the commissioner is by a stat-

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ute, the substitute for his own deed. Giving it this construction, it was conclusive that Logan had no title, and therefore, could not recover, and this is what we have seen the defendants were permitted to show, if they could.

When two or more titles unite in one person, they are merged, and his subsequent conveyance of one passes all

It is said that the decree of M'Nitt vs. Logan, is for the claim of Joseph M'Nitt only, and therefore, cannot affect the claim of Thompson, which Logan also held. It is true, that the equity set out, and the decree obtained against him, is a certain decree for the title or patent of Joseph M'Nitt, and there is no intimation either in bill or answer, that Logan had acquired any other title to the ground. But this can make no possible difference. The moment these two titles or claims of Joseph M'Nitt and Thompson, were united in the person of Logan, one merged in the other, and we are acquainted with no process of separation, by which they could be disunited—how he could convey one and keep the other, and the conveyance under the decree would consequently take both.

Decree and conveyance by a commissioner, has the effect to pass all the titles the party had, tho' not sanctioned in the suit.

The existence of another and superior title by virtue of which he held the land, might have been a good defence for him against the suit of M'Nitt, if he had set it up. But as he did not do so, it matters not how many other claims he may have acquired, or how strong or valid they may be; they would all pass by the decree and the conveyance in pursuance thereof. For a party cannot be permitted, in a case of that character, to try one defence after another, in a new controversy on each. On that hypothesis, controversies of this character would be endless, and the doctrine that *res adjudicata* is conclusive between the parties on the same subject matter, would fall to the ground.

Commissioner's deeds pass all the title the party has at the time—and a warranty in such deed, directed by the

But it is contended that, as Logan had conveyed the land to M'Chord, before there is any evidence *litis pendens*, between Logan and Barnard M'Nitt, as the conveyance of Logan to M'Chord bears date before the filing of M'Nitt's bill, and that as M'Chord was not party to that suit, his rights, or the title which he held, could not be prejudiced by that suit. This may be correct, if M'Chord was now the

plaintiff. B. M'Nitt may not have succeeded by the decree, in recovering any part of this 100 acres, and yet the decree and conveyance of M'Nitt be conclusive against him, in this action. It must be remembered that the decree directed him to convey, with warranty against all claiming under him, and the deed executed by the commissioner, is as broad in its warranty as the decree. M'Chord, before the commissioner executed this deed, had re-conveyed to Logan, and of course, the title gotten from M'Chord, which was hitherto unaffected by M'Nitt's decree, passed by the deed of the commissioner, as really, as if Logan had executed the deed himself in obedience to this decree. His warranty will still stand in his way, even if he should acquire many subsequent titles. He would be estopped to assert them against his warranty, which binds him to let the land alone till that warranty is released or removed.

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decree, operates to pass to the grantee the benefit of all title the party may afterwards acquire.

There is, therefore, no error in the judgment of the court below, and it must be affirmed with costs.

Wickliffe, for appellant; *Haggin*, *Depew* and *Loughborough*, for appellees.

Stewart vs. Tevis' ex'or.

COVENANT.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

Case 15.

Damages. Verdict. Practice. Error.

Judge OWSLEY delivered the Opinion of the Court.

April 22.

STEWART leased of Tevis a house and lot in the town of Richmond, for the term of three years, and covenanted to pay, annually, therefor, one hundred and fifty dollars. Suit was brought by Tevis upon the covenant, and breaches assigned in the non-payment of each year's rent. Stewart made default, and a writ of enquiry was awarded to assess damages. Five hundred and twenty-three dollars damages was assessed by the jury, and judgment rendered therefor against Stewart. To reverse that judgment, this writ of error is prosecuted.

The judgment cannot be sustained. The damages assessed by the jury, are unjust and excessive, Where the jury assess

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vs.
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and beyond what the court was bound, *ex officio*, to know the plaintiff in that court was entitled to recover.

damages not warranted by the allegations of the declaration, the court ought, *ex officio*, to set it aside, & if it be not done, this court will reverse the judgment and direct it.

Judgment ought not, therefore, to have been rendered for the amount of damages assessed, but the inquest of damages ought to have been, *ex officio*, set aside by the court, as was decided by this court, in the case of Tucker vs. Smith, 1 Littell, 209.

The judgment must, therefore, be reversed, with cost, and the cause remanded for further proceedings not inconsistent with this opinion.

Capperton and Breck, for plaintiffs; Turner for defendant.

TRESPASS.

Stewart vs. Jewell.

Case 16.

Error to the Clarke Circuit; GEORGE SHANNON, Judge.

Pleading. Allegation and proof. Statutes. Inclosures.

April 22.

Judge OWSELY delivered the Opinion of the Court.

Declaration.

STEWART sued Jewell, and declared against him, for trespass in shooting a horse in his inclosure, which is alleged not to have been such as is required by the act of assembly in such cases provided.

Evidence.

At the trial, which was had upon pleadings which allowed every defence to the merits, evidence was introduced by both parties; that on the part of the plaintiff, conducing to prove the allegations of his declaration, and that on the part of the defendant, conducing to prove that he was not guilty.

Instructions.

After the evidence of both parties was through, the court instructed the jury, that they must find for the defendant, unless they should find from the evidence, that the plaintiff's horse was within the defendant's inclosure at the time the defendant committed the trespass mentioned in the declaration by shooting the horse.

Verdict and judgment for defendant.

Under the instruction, the jury found a verdict for the defendant, and judgment was thereupon rendered against the plaintiff.

The question is, as to the correctness of the instruction which was given to the jury. Without proving that the horse was shot by the defendant within his enclosure, the plaintiff could not, we apprehend, be entitled to recover the double damages given by the act of assembly for such trespasses, and if the instruction had only gone, to inform the jury, that without proof of the horse being shot by the defendant, within his enclosure, double damages could not be recovered, we should have had no difficulty in sustaining the judgment. But if in fact, the horse was shot by the defendant, though not within his enclosure at the time, he was undoubtedly guilty of a trespass, for which the plaintiff has not only a right to maintain an action, but for which, if proved, he was, in this action, entitled to recover damages commensurate to the injury, notwithstanding he has declared as for a trespass committed within the inclosure of the defendant.

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JEWELL.

If, in an action under the statute, for damage to a beast, indicted by the defendant, within his insufficient inclosures, the plaintiff fail in proving a case within the act, he may yet recover for the trespass at common law.

The instruction was, therefore, erroneously given to the jury. The judgment must, consequently be reversed with cost, the cause remanded to the court below, and further proceeding there had, not inconsistent with this opinion.

Hanson, for plaintiff.

Lyle vs. Bradford.

Error to the Fayette Circuit; JESSE BLEDSOE, Judge.

CHANCERY.
Case 17.

Parties. Evidence. Process. Error. Appeals. Revisor.
Lis pendens. Lapse of time.

Judge OWSELY delivered the Opinion of the Court.

April 22.

To obtain a conveyance of the elder legal title to land, of which John Lyle, Patterson and others were possessed, Bradford exhibited his bill in equity against them, claiming the superior equity under an adverse conflicting entry. Several successive subpoenas in chancery were issued against all of the defendants named in the bill, but neither of which appears from the return of the sheriff, to have been served upon Lyle, and there is no entry

History of
the case.

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upon the record of the proceedings of his having ever appeared to the suit, nor does he appear to have answered the bill. The other persons named as defendants, answered the bill, and the cause came on to hearing in the court of original jurisdiction, and a decree was therein pronounced, dismissing Bradford's bill. Bradford appealed from that decree, and brought the case to this court. By the decision of this court, the decree of the circuit court was reversed, and the cause remanded to that court for a decree, to be entered in favor of Bradford for the land. The cause accordingly went back to the circuit court, and a decree was there entered in favor of Bradford against all the persons named as defendants in his bill.

Bill of revivor, stating the service of process on the original bill, upon Lyle, and its loss.

After this, John Lyle departed this life, and Bradford thereupon filed a bill of revivor, for the purpose of having the original suit, and the decree therein pronounced revived, and enforced against the decedent's heir and representative. The bill refers to the original bill, suggests the lack of any return of the sheriff, by which either of the subpoenas is proved to have been served upon the decedent, John Lyle, but alleges the loss of several subpoenas, some one of which it is stated, was served upon him, but if not served, it is insisted that from his active agency in the preparation of the cause, Lyle must be considered as a party to the proceedings, and particularly, as the cause was brought to this court, and decided in favor of Bradford, it is contended that the representative of Lyle must be concluded by the decree.

Answer, denying it.

The bill of revivor was answered, in which it is expressly denied, that any process upon the original bill was ever served upon the decedent, Lyle, or that he ever engaged in the management, or preparation of the cause, and it is insisted, that he was no party to the decree of the circuit court, or of that which was rendered by this court, on the trial of the appeal.

Decree of the circuit court.

The court was of opinion, that Lyle was a party, and made a decree, reviving and directing to be enforced the original decree against his heir.

To reverse that decree, this writ of error is prosecuted.

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We have no hesitation in saying, that the decedent, Lyle, was no party to the decree, and that his heir is not concluded by the decree, which was made in the original suit.

Were it even competent for Bradford to travel out of the record and proceedings of the original cause, and prove Lyle to have been party in the active management and preparation of the cause, by extraneous evidence, so as thereby to make him a party to the suit, we should be bound to say, that Bradford has altogether failed to succeed in doing so in the present contest. It is true that Bradford has succeeded in proving that the decedent, before the cause was first heard in the circuit court, knew that he was named defendant in the bill, but instead of proving that he assisted in the preparation or management of the cause, it is expressly proved that he refused to do so, alleging that he had never been served with process. We would, however, reject any effort to prove the decedent a party by evidence foreign from the record, unless the evidence was calculated to supply some defect in the record, occasioned by accident, loss, or the like. But in this case, no such evidence was introduced, so that whether the decedent was a party, must be tested by the record, and by the record only. Turning therefore, to the record, Lyle was most obviously no party.

It cannot be proved, a person is a party to a decree otherwise than by the record, except a loss of some part of the record be shown.

He was prayed to be made a defendant, by the bill and process was afterwards sued out against him, but he appears not to have been served with process, and if not served, he was not bound to answer the complaint set up in the bill against him, and having failed to appear or answer, he cannot be considered a party to the decree.

Naming a person a defendant in the bill does not make him a party, unless he appear, or is served with the process.

But after a decree was pronounced in the circuit court against Bradford, he seems to have brought the case before this court, and though it be true, that the decedent was no party to the decree, it is contended that by the record in this court, the

When the complainant appeals from a decree dismissing a bill,

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none are parties here but those who were parties to the decree below, however the orders of this court in the cause may be entitled.

Revivor of
 decrees and
 suits in Chan-
 cery.

cause appears to have been heard as to him, as well as the other defendants to the original bill, and hence it is inferred, that he was in his lifetime, and his heir and representative since, are concluded by the decision of this court from questioning the decree. It should, however, be borne in mind, that the case was brought before this court, not by writ of error, and the service of process on any one, but by an appeal prayed by Bradford, so that in whatever names it may have been entered on the order book of this court, it was in substance and effect, an appeal between those only, who were parties to the decree of the circuit court, and of course the decree of this court cannot be conclusive on Lyle or any other person, not claiming under, or being privy, to any of the parties.

It follows, that the decree ought not to have been revived, or enforced against the present plaintiff in error.

But a question arises, as to what disposition is to be made of the case. The decree reviving and enforcing the original decree, must, no doubt, be reversed; but is the bill of revivor to be dismissed? Or should the cause be remanded to the circuit court, for an order to be there made, reviving the original suit against the heir and representative of the decedent, Lyle, with permission for him to answer the original bill, if he should desire to do so, and for such proceedings to be had on that bill, as may bring the case to a final hearing and determination between Bradford and the plaintiff in error?

The principle of law, or rule of chancery practice, is not discerned, that requires, or would even authorize a dismissal of the bill of revivor. So far as the revival and execution of the decree, is sought by the bill, we have seen that Bradford cannot obtain the aid of the court; but his not being entitled to relief in that respect, forms no obstacle to a revival of the original suit against the heir of the decedent, Lyle, provided the case made out in the bill of revivor, be one which, by the usage of equity, and principles of law, ought to be revived, and such a case we understand it to be.

The right claimed by Bradford in his original bill, undoubtedly cannot have ceased to exist by the death of Lyle. On the decease of Lyle, the title held by him, passed, it is true, by operation of law, to his heir or representative, not, however, so as to defeat the equity of Bradford, but subject thereto, and to recover which, according to the settled rules of equity practice, Bradford was at liberty either to exhibit an original bill against the heir, or file his bill of revivor, to revive the original suit brought by him against the decedent, Lyle.

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Where the cause of suit survives against the representatives of a defendant who dies before decree, either a bill of revivor, or original bill, may be maintained.

The right of a complainant, in ordinary cases, to maintain a bill of revivor against the heir of a deceased defendant, who, before his death, was served with process, was not controverted in argument, but a distinction was attempted to be taken between such a case and the present, and it was contended that after the lapse of time, which Bradford suffered the cause to sleep as to Lyle, without causing process to be served upon him, and particularly after bringing the case to a hearing in the court of original jurisdiction, as to the other defendants, and after causing the decree of that court to be revised by this court, he should not be allowed to revive the suit against the representative of Lyle, but the cause as to him, ought to be considered as having been discontinued in his lifetime.

Lapse of time from filing the original bill, omission to serve the original defendant with process, and a final disposition of the cause as to the other defendants, no ground of objection to the bill of revivor, in such case.

This argument might be deserving greater consideration, were bills of revivor addressed to the discretion of the court, and not governed by any fixed rules of practice or principles of law. But such we understand not to be the case. The right of a complainant, after the death of the defendant, to revive his suit against the representative of the deceased defendant, whether the death happen before or after service of process, is as firmly settled by the uniform and immemorial usage of courts of equity, as if it were expressly given by legislative enactment.

We have no recollection of any case in which the right of a complainant to revive against the representative of a defendant dying before the service of process upon him, has been expressly decided, but

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the practice to revive in such a case, has hitherto been uniform and uninterrupted, and the lack of adjudged cases on the point only argues that the correctness of the practice has never heretofore been doubted.

It is true, that to some purposes, there is said to be no *lis pendens* until after process served, and we entertain no doubt, as to the correctness of the assertion in reference to the rights of strangers.

But it is equally true, that the suing out process, has at all times been held the commencement of an action or suit, and that as to the person against whom process has been issued, there must necessarily be a pending suit from the date of the process, so as to abate and require a revival upon his death. The lapse of time which passed away, without any process being served upon Lyle, has no influence prejudicial to Bradford's right to revive the original suit, nor is he placed in a worse condition by any thing which has transpired, either in the court of original jurisdiction, or of this court. We have seen that as to Lyle, the cause was not disposed of by the decision of either court, and by the laws of this country, the omitting to enter a continuance at each successive term, as to him produced no discontinuance of the suit.

Whether or not, the representative of Lyle, if he shall attempt to do so, will be at liberty to aid his defence by the time which has run since the process was first issued against Lyle, is a question that may become important after the suit is revived and prepared for hearing on the merits, but which it is unnecessary and premature in the present stage of the case to determine.

The decree of the court below must be reversed with cost, the cause remanded to that court, and an order there made reviving the original suit against the plaintiff in error, but with liberty for him to answer the original bill, and contest the right set up by Bradford to the land, and such further proceedings therein had, as may not be inconsistent with

Lis pendens
as to stran-
gers commet-
ces with ser-
vice of pro-
cess.

Date of the
process is the
commence-
ment as to
the parties.

Query of the
effect of the
lapse of time
from the fil-
ing the ori-
ginal bill the
process on
which had
not been exe-
cuted and the
filing a bill of
revivor, upon
the merits of
the complain-
ants claim.

the principles of this opinion and the usage of equity.

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Wickliffe and Haggis, for plaintiff; *Barry and Depew*, for defendants.

Clinton &c. vs. Phillips' adm'r.

DEBT.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Case 18.

Appeal Bonds. Practice in this court. Damages. Costs.

Judge MILLS delivered the Opinion of the Court.

April 22.

PHILLIPS brought against Clinton; his warrant of forcible detainer, and succeeded in the verdict in the country. Clinton filed a traverse, and on trial in the circuit court, Phillips again succeeded. Clinton appealed, and executed his appeal bond with his sureties, in the time prescribed by the court, and in the same penalty. Its condition is as follows:

Case stated.

"The condition of the above obligation, is such, that whereas, the above named *Clinton, Downing* and *Jeremiah Luckett*, [the securities,] have prayed for, and obtained an appeal from a judgment of the Franklin circuit court, pronounced at their July term, 1825, in a suit wherein the said *Ralph Phillips* is plaintiff, and the said *Moses Clinton* defendant: Now if the said *Clinton* shall duly prosecute said appeal, or shall well and truly pay to the said *Ralph Phillips*, all such damages and costs, as shall be awarded against him, in case — of the said *Phillips* is affirmed in whole, or in part, dismissed or discontinued, then this obligation to be void, else to remain in full force and virtue."

Condition of
the appeal
bond.

After giving this bond, *Clinton* filed his transcript of the record in this court, and his appeal was docketed accordingly.

Before his appeal was here disposed of, *Phillips* brought his action on the traverse bond, assigning for breach the non-payment of costs, and the damages which he had sustained by the delay and prosecution of the traverse.

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 vs.
 PHILLIPS'
 ADM'R.

Without noticing in detail the pleadings in this action, suffice it to say, that under the leave to give any special matter in evidence, which might have been specially pleaded after Phillips had given in evidence, the record of the traverse in the circuit court, Clinton offered the order granting the the appeal, the aforesaid appeal bond, and proof by the Clerk of this court, and the transcript in his office, that the appeal was still pending and undisposed of, and made the point that this action on the traverse bond would not lie till the appeal was disposed of.

Decision of
 the circuit
 court.

The court below rejected the appeal bond as invalid and affording no evidence that the appeal was prosecuted, and then treated the whole appeal as a nullity, and decided that Phillips was entitled to his action. Phillips accordingly obtained a judgment, and to reverse it, Clinton has prosecuted this writ of error.

Where the
 appeal bond
 is not execut-
 ed in the time
 prescribed, or
 not by the
 proper per-
 sons, there is
 no appeal,
 and the judg-
 ment may be
 executed.

In a case where a party has not complied with the order of the court below in executing the bond, inferior courts may treat the appeal as a nullity, and proceed to effectuate their judgments by execution.

Such cases
 will be struck
 from the
 docket of this
 court, without
 damages or
 costs, as not
 causes in
 court.

It is the invariable practice of this court, when the appeal bond is not executed by the same persons, or within the time prescribed by the order of the court below, to treat such appeals as nullities when docketed here, and to strike them from the docket, instead of dismissing them with the legal consequences of costs and damages. In such cases the inferior courts may treat them in the same way, as cases where the condition on which the appeal was granted, has not been complied with.

When the
 proper per-
 sons in due
 time execute
 the appeal
 bond, the
 case is in

But where the proper persons, in due time have executed the bond, and that bond is defective in its parties, recitals, or in not securing the appellee in all that he is entitled to, we have been in the practice of treating them as real appeals; and when applied to, to dismiss, because the bond is defective; and we have done so with costs and damages, still taking the distinction between the bonds, which we treat as nullities, and those which are defective, and

which may or may not be accepted at the election of the appellee. He may move to dismiss the appeal, because the bond is defective, and thus reject the bond, or he may acquiesce in the bond, and at last, it may be valid in law, to secure to him part of his demand, but not the whole.

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ADM'R.

court, but may be dismissed on motion and with damages and costs for the insufficiency of the bond.

If this distinction, which has long governed the practice of this court, is sound, it seems clearly to follow, that the court below erred in treating this appeal and bond as a nullity. It was a real appeal then pending before this court, but might have been avoided by motion here, until then the appeal was legal. We admit this bond is one which must have fallen in this court on a motion to dismiss the appeal for its defects. Its reciting an appeal by the securities, as well as the principal, and not securing the appellee in the judgment, from which the appeal was prayed, (not to mention others,) were apparent defects. But it was still binding on the appellant till avoided by the appropriate remedy. The court ought not, therefore, to have rejected it as a nullity, as it was good evidence to show an appeal pending.

In such case the judgment appealed from, is suspended and no action can be maintained predicated on the judgment being in force

From this it will also follow, that the action of Phillips on his traverse bond was premature, as the judgment on which his cause of action hung, was suspended, and had no force till the appeal bond was disposed of, *Yocumb vs. Moore &c.* 4 Bibb, 231. The court ought, therefore, to have instructed the jury that the plaintiff could not recover.

Judgment reversed, verdict set aside with costs, and cause remanded for new proceedings not inconsistent with this opinion.

Triplet, for plaintiff; *Haggin* and *Loughborough*, for defendants.

DEBT.

M'Guire vs. Trimble &c.

Case 19.

Error to the Greenup Circuit; W. P. ROPER, Judge.

Conditions. Assessments of damages. Jury. Practice. Statutes.

April 23.

Judge OWSLEY delivered the Opinion of the Court.

TRIMBLE, Poage and Canterbury sued M'Guire in debt, on the penalty of a bond which was executed to them by Thomas Ward and M'Guire his surety. The bond is dated the 20th of July, 1819, is in the penalty of three hundred dollars, and has subjoined thereto the following condition:

Condition of
of the bond
sued on.

"The condition of the above obligation is such, that whereas, the said Thomas Ward is about to issue from the clerk's office of the Greenup circuit court, a writ of replevin against the said Trimble, Poage and Canterbury; now should the said Thomas Ward perform and satisfy the judgment of the court in said suit, in case he shall be cast therein, then this obligation to be void, otherwise to remain in full force and virtue."

Breaches.

The declaration sets out the bond and condition, and after in due form, alleging the recovery of a judgment, for one hundred and twenty dollars, together with ten per cent. damages and cost of suit against Ward, by Trimble, Poage and Canterbury, in the action of replevin, for breach of the condition of the bond, avers that Ward has not satisfied, or performed the judgment of the court.

Plea of *nul
teit record*
found for
plaintiff

M'Guire pleaded *nul teit record*, and issue being joined thereto, it was tried by the court. The court was of opinion, that there was such a record as that mentioned in the declaration, and rendered judgment, "that Trimble, Poage and Canterbury recover the debt in the declaration mentioned, to be discharged by the payment of one hundred and fifty-nine dollars and eighteen cents, that being the amount of the judgment, damages and costs referred to in the declaration, and also, their cost by them expended in this suit."

Judgment for
the defendant
to be dis-
charged by
the damages
assessed by
the court.

To reverse that judgment, this writ of error is prosecuted by M'Guire.

It is assigned for error, that the court erred in rendering final judgment, without the intervention of a jury to assess damages.

M'GUIRE
Vs.
TRIMBLE, &c

The bond upon which the action is founded, is undoubtedly one with a collateral condition, and the objection raised to the judgment by the assignment of errors, is taken upon the supposition that in every action on such a bond, the damages occasioned by breach of the condition, must be assessed by a jury, and not by the court. Whether or not this objection is fatal to the judgment, turns upon the import of the sixth section of the act of the legislature of this country, concerning civil proceedings, contained in the first volume of the digest of the statutes, page, 248. That section is in the following words: "In all actions upon any bond, or on any penal sum, for non-performance of covenants or agreements in any indenture, deed or writing contained, the plaintiff or plaintiffs may assign as many breaches as he, or they shall think fit, and the jury, upon trial of such action or actions, shall, and may assess damages for such of the breaches as the plaintiff shall prove to have been broken, and on such verdict, the like judgment shall be entered, as heretofore has been usually done in such actions, and where judgment on a demurrer, or by confession, or *nil dicit*, shall be given for the plaintiff, he may assign as many breaches of the covenants, or agreements, as he shall think fit, upon which a jury shall be summoned to enquire of the truth of every one of those breaches, and to assess the damages the plaintiff shall have sustained thereby, and execution shall issue for so much &c."

Statute of
Kentucky in
relation to
actions on
bonds with
conditions—
copied from 8
and 9 Will.
III.

This act is a literal copy of the statutes of 8 and 9, W. 3, ch. 11, s. 8, enacted by the parliament of England, and should therefore be construed as that statute has been interpreted by the courts of that country.

Construc-
tions of Sta-
tutes.

Adverting to the expressions used in the act, it would seem from their plain and imperative import, necessarily to follow, that whenever breaches of the condition of a bond coming within the act, and upon which an action is founded, are assigned by the

In actions on
bonds with
collateral
conditions
the plaintiff
shall assign

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the breach
and a jury
shall assess
his damages.

plaintiff in his declaration, that the damages occasioned by the breaches must be assessed by a jury. Whether judgment be given for the plaintiff on demurrer, or by confession, or by *nil dici*, he may, according to the expressions of the act, assign breaches, and if he does so, the act imperatively directs a jury to be summoned to enquire and assess the damages. And not only so, but whenever an action is brought on such a bond, though the defendant neither makes default, confesses judgment, nor demurs, the plaintiff may assign breaches, and in the same imperative language, the act declares that the jury, upon the trial shall assess the damages.

Bond with
the collateral
conditions
meant by the
statute, in-
cludes all,
but those
with condi-
tions for the
payment of
certain sums
of money.

The only point about which, there is, therefore, any room for construction, and as to which there can be the least pretext for sustaining the judgment, relates not to what may be necessary to be done by a jury in actions founded upon bonds falling within the influence of the act, but to the question, whether or not, the bond upon which the present action is founded, contains such a condition as comes within the act. It may be said, that the damages to which Trimble &c. are entitled, on account of the breach of the condition of the bond, is fixed by the judgment which was recovered by them against Ward, in the action of replevin, and as there is nothing upon which, assessing damages for the alleged breach, the jury could exercise their judgment, it may be contended that the condition of the bond is not of the sort intended to be provided for by the legislature in the act to which we have referred, and therefore, not within the operation of the act. It is, however, barely necessary to refer to the adjudications of the British courts upon their statute, to refute and put at rest this argument. Sergeant Williams in his annotations to Saunders reports, has collated the cases which have been decided upon that statute, and he proves conclusively, that a condition, such as the one subjoined to the bond, upon which this action is founded, comes within the statute.

Cases on the
question of

He remarks, that "it is now settled, that in debt on a bond, with a condition for the doing any thing else but the payment of a gross sum of mon-

ey, or the appearance of the defendant in a bail bond, the plaintiff is bound to suggest breaches on the roll, in pursuance of the statute of 8 and 9, W. 3, ch. 11, s. 8;" and he refers to the case of *Collins vs. Collins*, 2 Burr. 820, in which it is held, that a bond for £5000, conditioned to pay an annuity of two hundred and fifty pounds to the plaintiff, came within the statute, notwithstanding it was objected that the legislature did not mean that the statute should extend to a case like that, where the condition was simply for the payment of a certain and precise sum of money, and where there was nothing on which the jury could exercise their judgment. Note 2 to 3 Saun. R. 167.

The judgment must, therefore, be reversed with cost, the cause remanded to the court below, and a jury there summoned to assess damages on the breaches alleged by the plaintiffs in that court, in their declaration, and after the damages are so assessed, for judgment to be entered on the bond in favor of them.

Triplett, for plaintiff.

Ashcraft vs. Brownfield &c.

Appeal from the Hardin Circuit; PAUL I. BOOKER, Judge.

Liens. Construction. Obligations. Parties.

Chief Justice BISS delivered the opinion of the Court.

On the 17th April, 1822, William Brownfield, executed to John Ashcraft, a writing, declaring that he had sold to said Ashcraft, "a certain tract, *as* piece of land, it being, and lying *between* John Ashcraft, *am* on the upper side, and John W. Eace on the *lore* side, and *convaid* to said Brownfield by Jeremiah Briscoe, said *convaince* record in Hardin county *clark's* office, for the consideration of three hundred and fifty dollars paid in hand, and it being plainly *undrstood*, that if the line of Morgan shall take any part of said survey, said Brownfield is to pay or discount *equivalent* to three hundred and fifty dollars."

M'GUIRE
VS.
TRIMBLE, &c
the applica-
tion of the act

CHANCERY

Case 40.

April 23.

Obligation of
of Brown-
field to Ash-
craft,

ASHCRAFT
vs.
BROWNFIELD
&c.

Conveyances
from Briscoe
to Brownfield

Before the year 1814, Jeremiah Briscoe had conveyed by deed of general warranty, twenty-two acres of land to said William Brownfield, he had likewise executed his obligation to said Brownfield for a larger parcel of land, part of the same grant which included the twenty-two acres, and Brownfield having sold to Mingis one hundred acres, Briscoe conveyed to Mingis, by request of said Brownfield that parcel, and on the sixth day of May, 1814, said Briscoe in consideration of \$130, conveyed to said Brownfield, by deed of warranty against himself, and his heirs only, by specified boundaries, declared to be the whole of Edward Brownfield's patent, bearing date on the 24th May, 1786; but the deed declares that said Briscoe had before deeded one hundred acres to Peter Mingis, part of said Edward Brownfield's patent of 400 acres, and likewise, that he had before that time, conveyed to said William Brownfield, twenty-two acres, or thereabouts, by deed with general warranty, therefore, these parcels of 100 acres, and of twenty-two acres, are excepted out of this deed, the balance remaining of said patent, supposed to be about 300 acres. To this deed Ashcraft the complainant, Peter Mingis and others were subscribing witnesses, and on the day of its date, it was duly proved by the oaths of Mingis and Downs, two of the witnesses, and admitted to record in the county of Hardin, wherein the land lies.

Mortgages
and assign-
ments.

On the 18th of July, 1821, however, William Brownfield, had mortgaged to William Cessna by deed duly recorded on the day of its date, one hundred acres of land described as the tract on which he lived, together with another tract on Bear Creek, and various articles of personal property, to secure the payment of five hundred dollars, this mortgage was known to Ashcraft, who refused to purchase of Brownfield, until this incumbrance on the proposed sale to him was removed, and accordingly, Cessna, who was anxious for the sale to Ashcraft, and aided in the negotiation, did release to Ashcraft, telling him that with the release of this mortgage, and one held by Brown, the land was free of incumbrance; Brown's mortgage was paid off by Ashcraft, and

Cessna is one of the subscribing witnesses to the obligation of William Brownfield to Ashcraft.

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vs.
BROWNFIELD
&c.

William Brownfield made an endorsement on the deed of Briscoe to him, for the twenty-two acres; "I assign the within to George Brownfield, to secure the payment of fifty dollars, as witness my hand this 6th February, 1818." To this Cessna was a subscribing witness. This was in possession of Cessna, in May 1822; the assignment was then not erased in any part, but since, the words "to secure the payment of fifty dollars," have been erased. Chastain with full knowledge of Ashcraft's purchase, and that he claimed the twenty-two acres, obtained this deed, applied to Jeremiah Briscoe, in July 1822, and obtained from him a deed, and received possession from William Brownfield, who was then living on the land.

The deed for the twenty-two acres has never been recorded, and the dwelling house of William Brownfield and orchard, are situate within the boundaries of that deed.

In June 1822, Ashcraft exhibited his bill against William Brownfield, to compel a conveyance of the land, according to his bond of the 14th April, alleging a demand and refusal. On the 5th of September, 1822, he amended his bill, and made Cessna and Chastain parties; he exhibited his bond of the 17th April, the mortgage to Cessna, the assignment from Cessna to him, as far as relates to the land, dated 21st May, 1822, the deed from Briscoe to William Browning, of the 6th May, 1814, charges that Chastain acquired the assignment of the unrecorded deed, and the deed thereby from Briscoe with full knowledge of his purchase of the twenty-two acres, and that the said assignment by William to George Brownfield, was only to secure the payment of fifty dollars; he charges, that William Brownfield and Cessna, before his purchase, both represented that by the release of the mortgage held by Cessna and Brown's mortgage, the land would be free from any farther incumbrance; that they fraudulently concealed the said assignment from William Brownfield to George Brownfield, that he

Ashcraft's
bill,

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vs.
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&c.

himself was ignorant thereof, as also, of the fact, that the deed for 22 acres was unrecorded; that Brown's mortgage was paid, and he has the release of Cessna's mortgage, according to Cessna's agreement to that effect, before his purchase; that Cessna had received part of the purchase money, and William Brownfield the balance; he prays that the land may be conveyed to him, that Cessna be compelled to pay Chastain the fifty dollars and interest, and both in his original and amended bill, he prays for such general relief, other than his prayer of specific relief, as may be proper and required by the nature of his case.

Answers.

William Brownfield and Cessna, and Chastain, contend that the obligation to Ashcraft, does not include the 22 acres; this is the bone of contention.

Decree of the
circuit court.

The circuit court refused to decree to Ashcraft the 22 acres, but for the residue, directed a deed with general warranty to be executed by William Brownfield: farther, that the defendant, Brownfield, pay the costs, from which decree Ashcraft appealed.

Discussion of
the evidence
and instru-
ment, on the
question of,
whether the
land was in-
cluded in the
bond for the
conveyance.

The expressions between John Ashcraft on the upper side, and John Wallace on the lower side, apply to the twenty-two acres, as well as to the residue; this is palpable by inspection of the plat of survey returned. The quantity claimed by Ashcraft, is between sixty and sixty-six acres. The southwest corner of the complainant's former purchase, (alluded to in the obligation of 1829, aforesaid,) is on Wallace's line, the angle at this point of junction, made by the courses of Wallace and Ashcraft, is an acute angle. Wallace's line runs to the northwestern corner of the twenty-two acres, which is also the corner named in the inclusive deed of Briscoe to William Brownfield of 1814; Ashcraft's old line strikes the northern boundary of Brownfield's patent, and of Briscoe's deed of 1814, at right angles, and the line from Wallace's northeastern corner, to the northwestern corner of Ashcraft's former tract, is a line common to Morgan and Edward Brownfield's patent, and Briscoe's deed made to William Brownfield. So that the land claimed by Ashcraft, under his purchase of 1822, lies in a right

angled triangle, bounded on one side by his own former tract, on the second by Wallace, on the third by Morgan's and Briscoe's (or Brownfield's) common line; Wallace's line from Ashcraft's corner to Brownfield's and Wallace's common corner, subtends the right angle. The 22 acres lie in the extreme north-western angle. The controversey, however, will be at once comprehended by the annexed diagram explanation. [See plat No. 1, at the end of the volume.] If the twenty-two acres were not intended to be sold to Ashcraft, then the tract should have been described as lying between Ashcraft, Wallace and the lines of the twenty-two acres. The reference to Morgan's line, shows also, that the twenty-two acres were intended; for the question was whether Morgan's line ran south fifty degrees east, with Brownfield's, or south forty-five degrees east, so as to clash with Brownfield, and include his house; but it seems there is no conflict between them. The mortgage which Cessna held, and which Ashcraft required to be assigned to him before he would assent to purchase, expresses to be for 100 acres, the tract whereon William Brownfield then lived, he lived on the 22 acres, they included the house and orchard. The fact of Ashcraft's insisting on having in this incumbrance before the purchase, and that the arrangement was accordingly made, is charged in the bill, not denied by the answers, and abundantly proved by the depositions. Before Ashcraft purchased, valuers were appointed to fix the price, of whom Cessna was one, the house and orchard were shown and estimated as part of the premises. The attempt is to show, that the sum of three hundred and fifty dollars, was only a fair price for the residue excluding the 22 acres, that is not alleged by the answers; a question is put to a witness whether the residue excluding the twenty acres was not worth \$350; he answers, he thinks the whole, including the 22 acres, worth six hundred dollars; against this opinion stands the opinion of the valuers appointed by the parties, and the contract.

The reliance is, that the wording of the contract excludes the 22 acres, because that deed was not recorded, and the contract refers to the record. The

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Reference to
the diagram.

Effect of the
clause in the
bond "con.

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vs.
BROWNFIELD
&c.

veyed to ob-
ligor by deeds
recorded in
the county
court office."

Obligation
taken most
strongly a-
gainst the
obligor.

An assign-
ment on a
deed of con-
veyance ex-
pressed to be
to secure the
payment of a
sum of money
creates a lien
in equity.

reference to the record proves that Briscoe had conveyed to William Brownfield, as well the 22 acres, as the residue. The obligation does not refer to one deed in particular. It does not except land conveyed by Briscoe, by a deed not recorded, but refers to the record to verify the title to the land sold. The record does verify the title from Briscoe, as well to the 22 acres as to the residue, the description between Ashcraft on the upper side, and Wallace on the lower side, and conveyed to said Brownfield by Jeremiah Briscoe, together with the reference to Morgan's line, leave no doubt as to the tract, the single description, "*said conveyance record*," cannot be abstracted from the other descriptions, nor be made by its equivocal enigmatical meaning, to overrule unequivocal descriptions. Every one who referred to the record would see distinctly that the 22 acres had been conveyed, and the conveyance was acknowledged by Briscoe, as attested by the record.

That the whole tract between Wallace's and Ashcraft's lines was sold, up to Morgan's line, subject to the contingency of refunding a part of the purchase money, if Morgan cut into Brownfield's claim, cannot be doubted. The obligation must be taken most strongly against the obligor; if he intended not to sell the 22 acres, they should have been explicitly excepted out of the general descriptions which include them.

That William Brownfield, Cessna and Chastain entered into a vile combination to defraud Ashcraft, is plain. The only difficulty is respecting the fifty dollars, for which George Brownfield had received the assignment of the unrecorded deed as a pledge. William Brownfield lived on the land, Ashcraft was not apprized of that assignment, not even when he exhibited his original bill. William Brownfield and Cessna concealed the fact; Cessna by his deed of mortgage from William Brownfield, acquired the legal title; but he knew of the assignment of the deed to George Brownfield; he was a witness to it. That assignment, however, passed but an equity. Chastain, by his deed from Briscoe, acquired nothing; Briscoe had nothing to part with, and Chas-

tain was acting in that with full knowledge of Ashcraft's claim. From whom Chastain obtained that deed and assignment, does not certainly appear, there is some reason to believe he acquired it from Cessna, and that he had it when he assigned his mortgage to Ashcraft, but that fact is not charged in the bill. It is there said, Chastain obtained that assignment from George Brownfield, who is no party. If Ashcraft had obtained a deed, clothing him with the legal title, there would have been no difficulty, he would have been a *bona fide* purchaser without notice, but he is complainant asking equity. Who was guilty of the erasure of the part of the assignment on the unrecorded deed, does not distinctly appear, if traced to George Brownfield, or to Chastain, or to Cessna, whilst either held it, then the equity which arose by virtue of that assignment, to have the fifty dollars, is gone.

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vs.
BROWNFIELD
&c.

It is clear that Ashcraft is entitled to have a conveyance of the 22 acres from William Brownfield, and from Cessna, but whether he shall be decreed to pay the fifty dollars with interest, or not, is the question. If he must, he is entitled to a decree over for it against William Brownfield. But to the final adjustment of the question, whether that mortgage or pledge created by the assignment of the unrecorded deed, has, or has not been extinguished by satisfaction, or by the erasure, or to whom it is to be paid if due, George Brownfield is a necessary party.

Parties in
chancery.

It is, therefore, ordered and decreed, that the decree of the circuit court be reversed, that the case be remanded, with leave for the complainant to amend his bill, touching the agreement of the unrecorded deed of 22 acres, and to bring George Brownfield before the court if he shall elect so to do, in reasonable time, to be assigned by that court, and for such other and farther proceedings to be had, according to the usages of courts of equity, so as to enable that court to make final decree in accordance with the principles expressed in the foregoing opinion.

Appellant to have his costs.

Darby, for Brownfield; Triplett, for Chastain.

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R

SCIRE FACIAS

Peteet vs. Owsley.

Case 21.

Error to the Rockcastle Circuit; JOSEPH EVE, Judge.

Bail. Scire facias. Conditions.

April 25.

Chief Justice BERR delivered the Opinion of the Court.

Bail to the action was entered into the recognizance under the act of 1821, is not liable till after *ca sa* returned, tho' that writ is abolished by the act, and so the *scire facias* cannot be maintained.

JOHN OWSLEY sued a writ of *capias ad respondendum*, against Edward Evans, bearing teste on the 29th June, 1824, and by affidavit procured an endorsement of the writ, that bail was required. According to the form given by statute, Benjamin Peteet acknowledged himself special bail by endorsement on the writ, on the 29th June, 1824. Owsley recovered a judgment against Evans, at September term 1824, sued a *feri facias*, which was returned no property found. Whereupon he sued a *scire facias* against the bail, and had judgment against him for the damages recovered against Evans.

The recognizance of bail to the action, or special bail, is an undertaking well known, and the law is well settled, that the bail can never be subjected to answer the debt or damages, without a *ca. sa.* against the principal. That is indispensable. The act of 1821, abolished all laws which authorized a *capias ad satisfaciendum*, and since that time no such writ could lawfully issue, to forfeit the recognizance aforesaid. Therefore, no *ca. sa.* has issued in this case before suing the *scire facias*, and none could have lawfully issued. The bail piece cannot, therefore, have been forfeited. Although the legislature did authorize bail to be demanded in certain cases, they failed to provide that any *ca. sa.* should issue against the principal in such cases, and did not provide any change in the undertaking of the bail, nor any mode by which the recognizance of bail should be forfeited. It is *casus omissus*, which this court cannot supply. It does judicially appear that the bail piece had not been forfeited, and therefore, judgment upon the *scire facias* should have been for the defendant.

Judgment reversed, and case remanded with direction to enter judgment for the defendant.

Plaintiff to recover his costs.

Caperton, for plaintiff; Robertson, for defendant.

Washington &c. vs. M'Gee

CHANCERY.

Error to the Christian Circuit; BENJ. SHACKELFORD, Judge. Case 22.

Parol contracts. Condition. Jurisdiction.

Chief Justice BISS delivered the opinion of the Court.

April 25.

IN 1817, M'Gee exhibited his bill against Washington, and the heirs of Beverly A Allen, for the conveyance of fifty acres of land, which the complainant claimed by virtue of a contract between said Beverly A. Allen and Kesler, dated 17th February, 1813, and an assignment thereof by said Kesler to the complainant, alleged as of the 7th October, 1813.

Bill of M'Gee against Washington and the heirs of Allen, for a conveyance of the land.

This contract is executory, Allen agreed to convey so soon as Kesler paid him therefor, one hundred dollars in work or services; but if Kesler thought fit to leave the land, Allen to pay him for all the work done on the land, and for work and services performed towards the price.

Abandonment of the contract and of the possession of the land according to a stipulation in the written agreement of purchase effectual, without being endorsed by writing.

Washington had obtained the title from Allen, as admitted by the bill, and denies any notice of the equity set up by the complainant. The heirs of Allen and Washington, deny that Kesler paid for the land, and insist upon an abandonment by Kesler of the contract, that by mutual consent the contract was dissolved, and that Kesler removed from the land. Washington alleges the assignment from Kesler to M'Gee was fraudulent and covenous, and made after he received his deed from Allen, in 1815, and denies any notice of the assignment to M'Gee, until the institution of his suit.

So far as respects this branch of the controversy, it is sufficient to say, that the complainant himself has given a death blow to his claim to the land, by proving affirmatively, that Kesler did agree with Allen to abandon the contract, according to the election given him, and that he did remove from the land, not having paid for it. He has totally failed to prove any notice to Washington of the assignment by Kesler, and it is directly in proof, that the assignment is antedated, so as to overreach Allen's deed to Washington, and the dissolution of the con-

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M'GEE.

tract between Kesler and Allen, for Kesler did not authorize his agent to sell his claim by virtue of that agreement, until long after he had dissolved the contract, abandoned the land, and had notice of the sale by Allen to Washington.

After the proof of the dissolution of the contract had been taken and filed in the cause, M'Gee amended his bill, and made Kesler a party, insisting that as the dissolution of the contract, was not by writing, but only by parol, it was not obligatory under the statute of frauds, but praying for a decree against Kesler for the value of the land, in case the court cannot decree the land specifically. Kesler was a non-resident, never answered, and the bill as to him was taken *pro confesso* upon order of publication duly executed. It is farther to be remarked, that all the defendants to the bill were residing without the limits of this Commonwealth.

The court decreed a conveyance by Washington to the complainant, and also that complainant pay to the heirs of Allen thirty dollars (in Commonwealth's paper,) with interest from 17th February, 1813, and all the defendants were ordered to pay costs.

Case held to be not within the jurisdiction of the court of equity.

As the decree against Washington and Allen's heirs is destitute of any plausible foundation, a question arises, what is to be done with the bill as to Kesler? Under the circumstances of the case, considering that Washington and Allen's heirs were absentees, as well as Kesler, and the latter has never answered nor submitted himself to the jurisdiction of the court, it does not seem proper to render any decree as to Kesler, as prayed for in the amended bill, as to that, there is no foundation for the jurisdiction of the court, whereon to ground a decree against Kesler; neither is the complainant entitled to the aid of a court of equity.

It seems to this court, that the complainant has failed totally to make out any equity against the defendant Washington, or against the heirs of Allen, and the complainant has not made out a case which is cognizable in the courts of this Commonwealth,

against Kealer, who is a non-resident, neither has the complainant exhibited himself in an attitude which entitles him to the aid of a court of equity.

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vs.
M'GEE.

It is, therefore, ordered and decreed, that the said decree of the circuit court be reversed, and that the cause be remanded, with direction to dismiss the bill with costs.

Crittenden, for plaintiffs.

Faris vs. Shanks.

CHANCERY.

Appeal from the Lincoln Circuit; JOHN L. BRIDGES, Judge.

Case 23.

Division of the Judges. Decree. Costs.

Chief Justice BISS delivered the Opinion of the Court.

April 24.

[Absent—Judge OWSLEY]

THIS case being heard upon the transcript of the record, and the arguments of counsel, and the court, composed of the Chief Justice and Judge Mills only, (Judge Owsley declining to adjudicate upon the matters in controversy between these parties,) being now sufficiently advised, the Chief Justice is of opinion, that the decree of the circuit court is erroneous, and ought to be reversed; but Judge Mills is of opinion, that said decree is not erroneous, and ought to be affirmed. It is, therefore, ordered and decreed, because of the said division and difference of opinion, that the said decree of the circuit court be affirmed, which is ordered to be certified.

One Judge declining to sit in the case and the other two not concurring, decree of the circuit court affirmed with costs.

And it is likewise ordered and decreed, that the appellant pay to the appellees, their costs in this court, and in this behalf expended.

Denny, for appellant; *Crittenden*, for appellees.

CHANCERY. *Stevenson and wife vs. Dunlap's and Blight's heirs.*

Case 24. Appeal from the Hardin Circuit; PAUL I. BOOKER, Judge.

Evidence. Writings. Copies. Cross bills. Appeals. Conditions precedent. Specific performance. Parol contracts. Improvements and rents. Leases. Practice. Liens.

April 25. Judge MILLS delivered the Opinion of the Court.

[Absent - Chief Justice BIBB.]

Case stated. This is a bill in chancery, brought first by Stevenson and wife, for the specific performance of a contract, in which, if granted, it will be necessary to divide and direct a conveyance of part of 131,000 acres of land.

Title to the land.

These lands were entered, as alleged, 98,000 acres thereof, in the name of William M^o Williams, in one entry, 28,000 acres in the name of John Hawkins, in another tract, and 5000 acres thereof, in the name of Paul Simon, in a third entry: the date of the entries does not appear from the record. The surveys were made in September, 1787, and the patents issued jointly to John Dunlap and Michael Hilligas, on the 4th of February, 1788. John Dunlap the patentee, died, and devised all his interest to his son, John Dunlap, jr. who sold and conveyed the same to Samuel Blight, his brother-in-law, who had also married a daughter of John Dunlap the elder. Michael Hilligas, the other patentee, died, having first devised his land to his children, who sold and conveyed all, except a small portion thereof to the said Samuel Blight, and although the heirs and devisees of the patentees, are made parties, and are proceeded against as non-residents, yet the style of the controversy, is between Stevenson and wife, and Blight who has appeared and answered.

Ground of Stevenson's claim.

The extent claimed by Stevenson and wife, is two ninths of the whole, and their equity, as they allege, is based on an article of agreement, dated on the 8th of October, 1783, between the said John Dunlap, Michael Hilligas, the patentees, and James Dunlap, George Keightly and William Orr, in which it is stipulated, that the parties are interested in sundry

unlocated land warrants, the said John Dunlap, James Dunlap, George Keightly and William Orr, to the amount of two ninths each, and Hilligas to one ninth, all being then in Philadelphia, which warrants, the said James Dunlap, Keightly and Orr, were to bring to the western country, and have surveyed, and the plats and certificates returned, on certain conditions and stipulations hereafter more fully noticed, and then, each by allotment, was to draw and receive patents in their own names.

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James Dunlap, Keightly, and Orr, did come to Kentucky, in the fall 1783. Keightly was killed by the Indians in the spring, or beginning of the summer, 1784, leaving one infant daughter, who is now Mrs. Stevenson, the appellant, then in Ireland, where both she, and her father were born; he never having left that country till the summer 1783, and he died a subject of the king of Great Britain. James Dunlap lived many years afterwards, but at length died unmarried and childless, leaving no relations in America, save the aforesaid John Dunlap the elder, who was his brother. James having been a native of Ireland, was never in the United States till he came with Keightly, in the year 1783.

Orr, was also, an Irishman, who came to America with James Dunlap and Keightly, and returned to Ireland a few years afterwards, and staid some time, and then returned to America in the year 1793, and he died in 1801, but not till after he had sold and conveyed his interest, which he claimed in these lands, to a Mr. Fulton, of Baltimore, who sold and conveyed it to John Alexander, whom Stevenson and wife make defendant to their bill, as now standing in the place of one of the original partners.

Alexander answered the bill, admitting the equity of Mrs. Stevenson, as heiress of Keightly, one of the partners, and alleging that he is entitled to the interest of Orr, and by a singular course of pleading, made his answer a bill also against Blight and the children of John Dunlap, and the children of Hilligas, and prays that his interest may be assigned and conveyed to him.

Alexander's
answer.

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Stevenson
and wife's
and Alexander's
bill dismissed;
appeal by Stevenson
and wife only

Blight had
notice of Stevenson's
claim.

Blight answered him, setting up the same defence, which he relies on against Stevenson and wife.

The court dismissed the bill of Stevenson and wife, as well as that of Alexander, and from that decree Stevenson and wife have appealed to this court.

The merits of the claim and defence will appear in the consideration of the case, and need not be recited, except so far as shall be necessary to understand the questions decided.

Blight, though a purchaser of these lands, cannot pretend to stand as an innocent purchaser, who has completed his title, and paid the consideration without notice of the claims set up thereto by the heiress of Keightly. For the proof is clear, that he heard of the claim long before he purchased, and in his answer, although he alleges himself to be a *bona fide* purchaser, yet he does not once deny notice of the claim. It is, therefore, evident, that he has gained no advantage in the controversy by his purchase, but must stand in the shoes of Hilligas and John Dunlap, and must resist the equity set up by the same defence that the patentees could have made against it. The share of the partners, John Dunlap and Hilligas, is secured, and more than secured by the legal title being vested in them by the patents. The share of James Dunlap, has passed by inheritance to John Dunlap, if it existed, and could pass, or descend in his situation as an alien. The parts, therefore, of Keightly and Orr, are alone left to be settled.

Evidence in
proof the original
agreement between
the Dunlaps,
Keightly, Orr
and Hilligas
and the copy
produced.

We have had some difficulty in admitting the article of agreement relied on in the bill. The complainants only present a writing, which purports to be a copy taken from the records of the county where the land lies, and where another copy was also illegally recorded. They declare their ignorance of where the original is, and charge some of the defendants with having it in their possession. Blight denies having the original, and also denies that the copy produced, is a true copy, and requires proof, and further denies knowledge of the contents

of the original. The complainants, Stevenson and wife, do not prove that the original was ever executed, or produce the subscribing witnesses, or show what was become of them, or prove either their hand writing, or the hand writing of the parties. But Stevenson and wife have made proof by Alexander himself, that about the year 1793, at the request of Orr, he called upon John Dunlap, for the original instrument, and Dunlap informed him that it was in the custody of Hilligas, the other patentee, from whom he obtained an inspection of it, and that it was in the handwriting of the parties thereto, as to the signatures, and that the copy now produced is a true copy.

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HEIRS.

It has been held in some cases of trials at common law, that if a party, on notice given for that end, produces a writing *entre parties*, on the call of his adversary, the adversary need not prove its execution, because the law, in such case will presume it genuine, and that the party producing it, would not attempt to withhold it, and then produce it against himself, unless it was so.

When one party produces a deed *entre parties* on the notice of the other party, its execution may be presumed it seems.

This case is somewhat analogous, and although the cases are contradictory on this point, yet, when it is known, that this writing was executed in Philadelphia, if executed at all, forty years before this trial, where the witnesses must, in all probability, have resided, that it was directed to by one of the patentees, and produced by the other; that John Dunlap has in more instances than one, both by writing and in words, recognized the claims of Keightly, and in one or two receipts for taxes, given to Mrs. Stevenson's uncles, for taxes on the land advanced for her by them, expressed her interest, or claim to be two ninths, which corresponds with the copy produced, and both John Dunlap and Hilligas, in a letter to the mother of Mrs. Stevenson in Ireland, have both admitted, that the father, George Keightly, had some interest, we incline to the opinion, that the complainants, Stevenson and wife, may be allowed to resort to the inferior evidence of a copy, after proving that it corresponds with the original

Circumstantial evidence in proof of writings.

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HEIRS.

produced, and shewn formerly by the patentees themselves.

As to Alexander, however, the case might be different. His deposition could not be used, and is not offered to be used in his own case. But we do not conceive that it is proper to decide whether he can or cannot use this copy, for a reason hereafter mentioned.

Substance of
the original
agreement be-
tween the
Dunlaps,
Keightly,
Orr, &c.

The article recites, that the parties had purchased sundry Virginia land warrants, and recites the names to whom issued the numbers and quantities of each, and then contains the following precedent conditions and stipulations, to be performed on the part of Keightly, James Dunlap and Orr. The quantity was 135,000 acres in the whole, and they were to set off with convenient speed, from Philadelphia to Pittsburgh, thence down the Ohio, and to enter some of its waters in search of unlocated and unappropriated *good* land, if the same was not attainable on the banks of the Ohio, and when found, to cause the quantity of lands to be surveyed by the surveyor of the county, in one, or as many spots or places, as should be to the greatest advantage of the concern, to obtain drafts of the same, and returns of survey to the proper officers, from the said surveyors, to the end, that patents for the land might be obtained. The instrument then proceeded to state, that when the said James Dunlap, Orr and Keightly, should "so" have superintended the surveys of the aforementioned land, and have the drafts and returns thereof made out, then the parties should draw lots for the same, in small parcels, to render the whole more equal, and that patents might issue accordingly. Then John Dunlap and Hilligas were to pay the acting partners, James Dunlap, Keightly and Orr, their proportion of the expenses of the trip, according to the quality and quantity which they should obtain, and likewise, pay six dollars for each thousand acres of respective shares.

The bill of the complainants, Stevenson and wife, does not fully allege the performance of these precedent conditions, on the part of Keightly during his

life, or of his co-partners, James Dunlap and Orr, after his death, to the extent of their undertaking.

The amount of their allegations is this, that James Dunlap, Keightly and Orr, did proceed from Philadelphia to Kentucky, and caused the land warrants to be located and entered, or 131,900 acres thereof, leaving the remaining 4000 acres in the dark, as to what had become of them. They further allege, that George Keightly made ample provision and disbursements for the surveying of the lands before he was killed, and that John Dunlap and Hilligas had, in fraud of the rights of the heiress of Keightly, got the lands patented to themselves. They say nothing about what Orr and James Dunlap did after the death of Keightly, although they were first the joint, and then the surviving obligors of Keightly.

The bill of Alexander, and also his answer in this respect, is still more deficient. But we need not notice it, except so far as it might be brought in aid of Stevenson and wife. For, from a minute examination of the record, it will appear, that the case of Alexander is not before the court. The court below, as was very proper, dismissed his bill by a separate decree, and he prayed a separate appeal, yet he never entered into an appeal bond. He is, therefore, only before the court as a defendant to the bill of Stevenson and wife, as far as it is necessary to do them justice. His own claims, set up by a bill attached to his answer, form a distinct suit, although he has been allowed to attach it to the suit of Stevenson and wife. It is not so intimately connected with the first suit that justice cannot be done without his claim. And although, it is a general rule, that when a complainant appeals, he brings with him all the parties to the bill and decree as they stood in the court below, yet it does not thence follow, if one of the defendants shall, by a bill attached to his answer, contrary to the usages of a court of equity, implead another defendant, or a stranger in a controversy, in which the original complainant had no concern, that this latter controversy is brought before this court on the appeal of

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HEIRS.

Stevenson
and wife, in
relation to
the surveying
the lands and
obtaining the
patents.

When a defendant to the original bill files a cross bill, making his co-defendants and others defendants, and the original and his cross bill are each dismissed, he appeal of the original complainant does not bring the decree dismissing the cross bill before the court.

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HEIRS.

the original complainant. Alexander had a right, or an election, to acquiesce in the decree against him, or to appeal from it. He has chosen the former course, by omitting to execute an appeal bond. If, therefore, we should say, that Stevenson and wife, by their appeal, have brought the controversy between Alexander and the other defendants before the court, where it must be tried, it would be allowing Stevenson and wife to compel Alexander to try the cause in this court without his consent, and of subjecting the defendant in his bill to an adjudication of this court, when neither the complainants or defendants in his suit require it. Such a consequence cannot be allowed. And although it has been supposed in argument, that he is a party complainant here, and he has been represented by an argument made in his favor, yet it has arisen from the inattention of counsel, in not attending to the true state of the record in this respect.

Blight's answer, resisting the claim of Stevenson and wife under Keightly.

In answer to the bill of Stevenson and wife, Blight insists, that the locators, if they located at all, not only did not get good land, as they were bound to do, when they might have done so by locating in smaller tracts, as their undertaking contemplated, but that they located on bad lands in large bodies, and on lands before appropriated, and that they never accounted for 4000 acres of the warrants, but appropriated them to their own use. But he denies that they ever located the warrants at all, or paid one article of expense attending the same; that they did not pay their respective portions in the purchase of the warrants at first, that they did not pay a cent for either locating, surveying or returning the plats and certificates to the register's office, or pay any expenses incident thereto, or the taxes thereon due to the government since

Evidence of the non-performance of the agreement on the part of Keightly, Orr, &c. and ex-

Before we ascertain whether these then acting partners, James Dunlap, Keightly and Orr, or either of them, did acquire as good land as they ought, or as they might have done, we will ascertain whether they really did locate. They came to Kentucky it is true; but they brought with them an adventure in merchandize, and set up a store in Dan-

ville, which James Dunlap attended to, and another at Louisville, under the immediate care of Keightly, who was killed near that place; and it is not shown by any express proof, that they ever did one act towards locating the warrants, and indeed, the entries are not filed, nor can we know, from this record, whether they were made before the death of Keightly or not. It is ascertained by the proof, that a certain Joshua Archer located the warrants, and acted as a pilot, in conducting the surveys, and the only act shown to be done by the acting partners, is, that Orr attended making a part of the surveys. It is also clearly proved, that Archer never was paid for locating by either of the acting partners, James Dunlap, Orr or Keightly, but on the contrary, he claimed and received for his services, \$666 66 2-3, paid by John Dunlap. The surveys were never made, till 1787, long after others had surveyed and obtained older grants on a large proportion of the ground, and even then, the surveying was paid for by John Dunlap, to the amount of \$1373 33. The like may be said of the register's fees on the return of the plats and certificates to his office, amounting to \$262 18.

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HEIRS.

penses paid
by John Dunlap
for surveying, &c-

We waive the price of the original warrants, which is alleged to have been paid by John Dunlap, because we suppose that the agreement recognizes an interest in the partners, James Dunlap, Keightly and Orr, and we conceive that it is inferrible from the agreement, that this interest was to be paid for by the personal services of these then acting partners, or in travelling and locating, and in surveyor's and register's fees, of which, according to the most liberal interpretation of the agreement, John Dunlap and Milligas, could not be bound to pay more than their proportion, and six dollars for each thousand acres of their interest, in addition, and that after the acting partners had first performed their duty.

Effect of the
original contract.

The taxes also, on the whole land, have been paid from the commencement of the government to the trial of this suit, except the taxes from the year 1792 to 1799, which have been refunded to John Dunlap, by two of the uncles of Mrs. Stevenson.

Taxes.

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HEIRS.

These large expenditures of money by John Dunlap, imposed upon him by the direct failure of those who were bound to perform their precedent conditions, are sufficient to cause a court of equity to refuse its aid.

To obtain a specific performance, the complainant must shew the performance of the conditions precedent on his part or account for his failure, and shew that his defalcation is a proper subject for compensation.

To reach a specific performance, the complainant must show that he has performed his part, if precedent, and that he is ready to do so, if his part is to be a subsequent act. At least, he must show a substantial performance, or that he was precluded from performing by the conduct of the defendant, or that there was an incidental failure, which was a proper subject of compensation, and that, without compensation was admitted, complete justice could not take place, otherwise, if ample justice can be done by compensation to the complainant, for his partial performance, he is almost always left to his remedy at law.

Failure of one partner in his undertaking to make the locations and have the surveys executed, cannot be compensated, and the defaulter allowed his part of the land.

This case, we conceive, cannot be a case of compensation by the complainant to the defendant, or to John Dunlap and Hilligas, if they were before the court. The personal service of searching out, and fixing upon a territory, and ascertaining the objects there, by which a description of the land could be embodied in an entry, was a work that the acting partners were to see well performed, and is a very important part of the duty, so much so, that it is well known in the history of the jurisprudence of this country, that it was usual to give a third, and more frequently a half of the warrants for the performance of it. This would be, therefore, an insurmountable objection *per se*, to the enforcement of this contract, and it is more weighty when added to the fact, that through the failure of these acting partners, John Dunlap and Hilligas, had afterwards to advance large sums for the location, surveying and returning the surveys of the whole quantity, or otherwise, be in danger of losing all their interest in the adventure. We cannot, therefore, conceive that Stevenson and wife have shown any vested equity in Keightly under the contract, by virtue of any thing that her ancestor did, added to all that was done by both James Dunlap and Orr.

We have been thus particular in ascertaining the merits of the equity reported on its original grounds, abstracted from other considerations, and subsequent events, and it was necessary thus to settle its value, for the purpose of meeting another claim which is set up by the complainants.

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It is clear, that if Keightly had an equity at his death, it could not descend to, and vest in his daughter, because both he himself, and his daughter were aliens, and of course, his interest in lands could not descend to her, but it would pass to the Commonwealth by escheat, and no inquest of office was necessary for ascertaining the escheat.

Interest of an alien in lands in Kentucky, in the year 1784, did not pass to his heir, but escheated without office found.

On the 11th of December, 1823, the legislature of this State passed an act, as will be seen in the session acts of that year, reciting the agreement, and the death of Keightly, and the supposed escheat in consequence of his alienage, and granting to Mrs. Stevenson all the right of Keightly, escheated to the Commonwealth, and this act is relied on by the complainants, as removing the bar of alienage, and giving them a title to the land.

Statute of Kentucky granting to Mrs. Stevenson whatever rights escheated on the death of Keightly.

This act has not granted more than Keightly had, and which the Commonwealth took by escheat at his death. Now if we admit that an equity could be escheated and pass to the government as well as a legal estate, and that after the Commonwealth took an equity, she could regrant it without prejudice from an intervening grant, as this court has held with regard to a patent in 3 Litt. 394, and at the present term, in the case of Pope &c. vs. Hart's heirs, and of course, that the grants or patents to John Dunlap and Hilligas, could not prevent the operation of the act, still the enquiry must go back to the equity held by Keightly. The act has granted no more than what the State took from him, and if that was not a valid equity, at the time it was received, it is not rendered more operative by the statute, and as we have seen that it was not a valid subsisting equitable estate at that time, the act is of no service to the cause of the complainant.

Grant by the State of escheated title overreaches intervening grants to others, obtained under the general law.

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Dunlap's recognition of Mrs. Stevenson's right to the portion of the land claimed under Keightly.

But it is insisted that this equity derived from Keightly, has often been recognized by John Dunlap, and it ought, therefore, to be enforced.

It is true, that John Dunlap received from the uncles of Mrs. Stevenson, while she was an infant, the proportion of the taxes on Keightly's share, from 1792 to 1799 inclusive, and on the face of the receipts expressed, that her interest was two ninths; on their declining to pay taxes further, he wrote to her mother in which he states that Keightly was interested in the claim; that the uncles of the heiress had discontinued paying of taxes, and urging her to make arrangements for the payment, or the land, which lay uncultivated, would be sold. This letter was dated in 1801, and was signed by Hilligas, the other patentee, and this is all the recognition of the claim ever given by him. In the year 1797, perhaps at the instance of Orr, the commissioners appointed by the county court, attempted a division, and reported, and recorded their proceedings. John Dunlap visited this country shortly afterwards, and with one of the commissioners, reconnoitered the lots, and then expressed himself, that the girl in Ireland, which must have been Mrs. Stevenson, ought to have choice, as her father had lost his life in the attempt. When John A. Stevenson had married his wife, and brought her to America, he wrote to one of these commissioners, that said J. A. Stevenson had married the daughter of Keightly, and arrived in America, whereby all the parties were represented, and advising the commissioner to show him the land, and to forward on his own deed, which is supposed to be the deed which the commissioners were allowed to make in dividing the land among the parties. He also, wrote to Stevenson himself, advising him to settle on the land, as his residence there might be of service to himself, as well as all the claimants. Stevenson accordingly settled there, and afterwards on a visit to this country, John Dunlap was at the house of Stevenson, who then resided on one of the tracts, and on Mrs. Stevenson expressing a dissatisfaction with the country, and a wish to leave it, he advised her not, and suggested, that she would do better to remain.

In addition to all this, it seems to have been traditionally understood in his family, that there were several co-partners in the land, of which Keightly was one, and he has said as much to several persons, and never seemed to dispute the title of Keightly; but generally, on all these occasions, he set up his claims for money, which he had had to pay in acquiring and preserving the lands, which, when paid, he admitted would entitle the heiress of Keightly to his share.

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Upon these recognitions of title, the bill is not founded as creating an equity, where there was none before. They are brought in aid to cure the defects of the original claim, or as admitting its validity. They therefore, do not preclude the defendants from proving their original defects, not one of which do the complainants offer to remove; but insist for a conveyance, notwithstanding the default of the original contractors. If the defendants, therefore, have been, as we have seen, successful in showing that the compliance of the acting partners was not sufficient to vest an equity, these recognitions cannot carry the title with them.

Where the recognition of the claim is relied on as evidence of the original equity, it may be repelled by proof of the invalidity of the claim.

But what is more conclusive against these recognitions of title by Dunlap, is, they were all made before the passage of the act of assembly relied on, and during a time when the heiress of Keightly had not, and could not have, the least title, either legal or equitable, because, as we have said, the original equity was not good, and if it was, it had escheated to the government, and the heiress had no other or greater title than any other individual, and such remained to be the fact during the lives of John Dunlap and Hilligas. It was necessary, therefore, that these recognitions of title should have been strong enough to create an original equity, which could be specially enforced, or the complainants can have no relief thereon. If the government had brought her bill to enforce this original equity, and had given these recognitions of title to the daughter of Keightly in evidence, they could only have been viewed as so many acknowledgments, that there was an original equity, and could not have

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HEIRS.

One who
would have
equity must
do it.

Nonperform-
ance on the
part of
Keightly is
the same ob-
jection in the
mouth of the
alienee of his
devisees as
between the
original par-
ties.

After the
heiress of
Keightly was
induced from
Ireland here
by Dunlap's
recognition
of her claim,
and settled
on the land,
his alienee is
allowed to
deny her title

precluded the patentees from showing that there was none originally.

If the complainants meant to rely on these last recognitions of title, they ought to have shown that they had done equity by paying up the large sums of money which John Dunlap had expended in saving the land. This they have not done.

It is, however, urged, that these sums of money are due to the personal representatives of Dunlap, and as they are not before the court to settle the account, the defendants cannot avail themselves of the defence. This argument is capable of being turned against the other side with greater force. These representatives are absent because the complainants will not bring them here to do equity now, nor do they show that they have done equity before they filed their bill; but contend that they have caught Blight in the trap of controversy by himself, under such circumstances, that he cannot avail himself of this defence. They seem to have forgotten, that if John Dunlap and Hilligas could have set up this defence while they held the title, the defence is in no worse situation in the hands of either their devisees, or assignee of their devisees. The transfer could not have lost the defence.

The only doubt which remains, is, whether these recognitions of title, and the inducing Stevenson to settle on the land, are not strong enough to bind Dunlap to convey on the ground of fraud, and not on the score of contract. We allude particularly to the letter of Dunlap to Stevenson himself, and the letter to one of the commissioners. It is, however, clear that those letters alluded to the original claim, the equity of which was supposed to be in Mrs. Stevenson, and were not intended to make any new engagement; and as to the suggestion, that if Stevenson should settle on the land, and his settlement should fall to the rest, there should be a sufficient exchange to protect his settlement, it is so indefinite, that it cannot be measured. How much land should thus go for inducing Stevenson to settle, cannot be told. Certainly not the whole tract in which Stevenson and his wife had then no interest, and there

is no guide by which to assign him a less quantity, even if it be admitted, that Dunlap by thus inducing Stevenson to settle, had been guilty of such a fraud as would compel him to part with some land. On this ground, therefore, the complainants are entitled to no relief as to the partition and conveyance.

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HEIRS.

From the whole aspect of the case, we are satisfied, either that John Dunlap did not know, that by reason of alienage, the child of Keightly inherited no title, or knowing of it, as some of the depositions prove, he did not intend to take advantage either of that, or of the failure of the acting partners in performing their part of the agreement. The former, he probably meant to waive, and treat Mrs. Stevenson as an heiress, and for the latter, he meant to accept compensation and restoration of his money expended, especially, as it now appears, that such remuneration with its interest, would approximate near to, if not fully equal to the value of the whole share of Mrs. Stevenson, after deducting what is covered by elder grants. But in complying with these intentions he always had an election. He might have treated Mrs. Stevenson as possessing no title, both because her father had none, on account of the failure of him and his co-partners in performing the contract, and also, because she could not inherit his equity if any he had. As by his death his title had passed into other hands, who now stand in his place, they have a right, as he had, to refuse a specific performance. We, therefore, conceive the court below did not err, in refusing to compel a division and conveyance of the estate.

Decree dismissing the bill of Stevenson and wife, for a division, approved.

But in dismissing entirely the bill of Stevenson and wife, and granting them no relief, we conceive the decree of the court below too rigorous. For although the complainants are not entitled to a conveyance, yet they have been flattered into the expectation and belief, that they should get a title, and have been deluded into a settlement, on the land, and into improving it as their home, under circumstances which give them a strong claim for compensation for their improvements, and even to

Heiress of Keightly and her husband induced to settle on the land by a recognition of their claim for a part, now found invalid, held to be entitled to com-

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HEIRS.

pensation for
their im-
provements.

a lien on the land, till they are paid. It is true, that Blight has not, as yet, disturbed their possession, by obtaining a judgment, and it is equally true, that the main object of Stevenson's bill is a partition and conveyance, and he sets up no express prayer for the value of his improvements. But he charges, that trusting to the letter of Dunlap, he has set led, and made valuable improvements, and he prays for a partition and conveyance, and then adds the general prayer for relief, and the dismissal of his bill absolutely would bar his claim for improvements, when Blight's heirs, as he is now dead, should proceed against him for the possession. It is, therefore, competent and proper for the chancellor, to give him that compensation now, at the same time subjecting him to the equitable terms of surrendering the possession, as soon as his lien is removed by the payment of this claim, or by the sale of the land to a stranger as a means of enforcing the payment by the lien.

Principle the
compensa-
tion for im-
provement
and charges
for rents shall
be calculated
on, by the
commission-
ers.

He is, therefore, entitled to payment for such of his improvements as are lasting and valuable, fixing their value at the time when Blight filed his answer, resisting the complainants right to recover the land. From the same period, Stevenson will be bound to account for the reasonable rent of the premises, still allowing new improvements after that period, to sink the rents. Also, the price of his improvements, will be subject to be lessened by waste, or damages committed on the premises, by improper cultivation or otherwise, during his occupancy. This account or assessment, ought to be made out by commissioners appointed, with competent powers to accomplish it according to the usages of a court of equity. On the return of this report, if the balance is in favor of Stevenson, he must have a decree for it, and a lien upon the land, to the extent of his original claim to secure it; being at the same time subjected by the decree of the chancellor, to surrender the possession to Blight's heirs on the payment of the decree, or to a purchaser, if the land be sold under the lien, as hereinafter directed.

On the return of the report, and the decree in favor of Stevenson for the balance found, reasonable day ought to be given to Blight's representatives for the payment of the decree, still leaving the possession undisturbed. But if the money is not then paid, a further decree ought to be rendered, directing the sale of the land, to the amount of two ninths of the tract, or so much of that two ninths, as shall be sufficient to discharge the demand, and Stevenson must be directed by the decree to surrender the possession, and Blight's representatives to convey the title to the purchaser. But if the whole of the improvements of Stevenson are discharged by the rents, waste and damages, then this bill must be dismissed with costs.

STEVENSON
AND WIFE
VS.
DUNLAP'S
& BLIGHT'S
HEIRS.

Directions
for carrying
the decree in-
to effect.

We will further add, that Stevenson paid one half of the direct tax, in redeeming the land after it had been sold to Samuel Davis, under an arrangement, that this payment should not prejudice the title of either, and he also paid the direct tax of another year, through the instrumentality of a Mr. Morrison. As Blight was bound by his duty to government, to pay these taxes, and Stevenson paid them, under the delusive expectation of title, Blight's estate ought to refund these sums with interest, and therefore, they must be taken into the account herein directed. As to the portion of the taxes paid by the relatives of Mrs. Stevenson for her to Dunlap, in his lifetime, the complainants must be left to assert their claim against the estate of Dunlap.

Amount paid
for taxes af-
ter Stevenson
and wife
came to the
country, to
be allowed
and the land
bound for it,
as for the va-
lue of the im-
provements.

Decree reversed with costs, cause remanded for such proceedings and decree, as shall conform to this opinion and the rules of equity.

Denny and Mayes, for appellant; *Talbot and Darby*, for appellees.

CHANCERY.

Chapline vs. Moore &c.
M' Afee and ux. vs. Moore &c.
Chapline and ux. vs. Moore &c.

AND

Moore vs. Chapline &c.

Case 25.

Cross appeals from the Mercer Circuit; W. L. KELLY, Judge.
Infants. Executors. Guardians. Fees of counsel. Distribution. Husband and wife. Commission. Interest. Accounts. Parties. Practice.

April 19.

Chief Justice BIBB delivered the Opinion of the Court.

Parties.

LAWSON MOORE, George Moore and William Moore were brothers. George died in 1810, in the county of Westmoreland, in the State of Virginia, leaving his widow, Hannah, and four infant children, Elizabeth, (now wife of Jacob Chapline,) Judith Ellen Moore, (now wife of Robert M'Afee,) William B. Moore, and Allen Lawson Moore.

Will. Moore
dies and

In 1812, one other of the brothers, William Moore died, in the State of Pennsylvania, and town of Carlisle, unmarried and intestate, leaving a considerable estate, real and personal.

Irvine and
Given ap-
pointed his
administra-
tors.

In July 1812, administration of the goods and chattels, rights and credits of said deceased, William Moore, was committed, by the orphan's court of the county of Cumberland, and State of Pennsylvania, held in the town of Carlisle, to William Irvine and James Given, who entered into bond, in a penalty of sixty thousand dollars, with approved sureties, for the due administration and account of the personal estate.

Appraise-
ment.

The administrators, on the 23rd of September, 1813, returned an inventory and appraisement of the personal estate, to the amount of \$42,059 13, an account of effects administered to the amount of \$24,578 24, shewing a balance unadministered, of seventeen thousand four hundred and eighty dollars eighty-nine cents.

In this account of credits claimed by the administrators, of \$24,578 24, is included a claim of \$1426

50, for their services, founded on an agreement of Lawson Moore with them. for their resignation, to allow five per cent on the monies theretofore paid, as well as upon those paid over to the administrator, *de bonis non*, to be appointed, and two and an half per cent upon all paper securities delivered over to their successor, when, and as the judgments, notes and book accounts should be collected. The credit of \$1426 50, thus claimed, was passed, *de bene esse*, by virtue of that agreement, by the orphan's court, subject to any equity, which may, or can arise, when the minors arrive at age, if it is then thought proper to dispute the same. And upon the said settlement, the court entered of record, that it appeared to the court there were ample assets to discharge all debts.

CHAPLINE
AND
MOORE, &c.

Irvine and
Given's ad-
ministration
account.

Upon this settlement the administrators resigned, and the court appointed Christian Leonard, administrator *de bonis non*, who gave bond and security accordingly. His account was settled and approved by the court, on the 12th December, 1822, shewing a balance in his hands of \$1434 24, for distribution.

Irvine and
Given's re-
signation and
Leonard ap-
pointed ad-
ministrator
de bonis non.

On the petition of Lawson Moore to the orphan's court, on the 15th September, 1812, stating that one half of the real estate belonged to himself as one of the heirs, and the other moiety to the four infants, under fourteen years, children of George Moore, deceased, the other heirs of William Moore, deceased, and praying partition of three several tracts of land, appropriate writs of inquisition, *de partitione inquirendo*, as known to the laws of Pennsylvania, were issued. Upon these inquests the number of acres of each tract, and values per acre, were returned, with a report, that a partition of the several tracts could not be made by division of the lands, without spoiling the tracts. At the September court, 1813, Lawson offered sureties to be bound with him for payment to the other heirs, their respective shares of the said valuation, and to take the whole of the lands, which being approved, eight several recognizances were acknowledged in court by Lawson Moore, and his sureties, to the guardians

Real estate of
the deceased
in Pennsylv-
ania purchased
by Lawson
Moore under
proceedings
had in Or-
phans court.

CHAPLINE
AND
MOORE, &c.

of the infants, conditioned for the payment of the sums due to the other heirs respectively. The court had theretofore appointed Thomas Urie and John Helpelstein, guardians for the infant heirs, and they had executed bonds with security for the faithful performance of their duties. The aggregate valuation of the three tracts, after deducting the costs of the inquisitions, amount to \$19,052 52 cents, the half of which was \$9526 26 cents, which gave to each of the infants the sum of \$2381 56 1-2 cents, and so the recognizances require that sum to be paid to the use of each, on or before the 25th of September, 1814, with interest from the 25th March, 1814.

Widow and
children of
Geo. Moore
come to Ken-
tucky, and
she marries
A. Chapline.

In the latter part of the year 1813, Lawson Moore brought the widow and children of his brother George Moore, from Westmoreland county, Virginia, to the county of Mercer, Kentucky, settled Mrs. Moore with her children, on a small tenement, on a tract of land belonging to him, where she and the survivors respectively continued to reside, until the marriage of Mrs. Moore with Abraham Chapline. Allen Lawson Moore died in Mercer unmarried, intestate, an infant of tender years, in 1814.

Moore's set-
tlement with
his brother's
widow, short-
ly before her
and Chap-
line's mar-
riage.

On the 25th March, 1819, very shortly before Mrs. Moore's marriage with Abraham Chapline, Lawson Moore stated an account against her for house rent, articles of provision, &c. &c. with credits also made out by him for boarding and clothing her children, making a debit against her of \$1920, the credits amounting to \$1351, leaving a balance of \$574, for which he took her note, and also her receipt for \$1139 to himself as guardian of the children; this sum he charges against the children.

Moore's ac-
counts, as
guardian of
his brothers
children.

After the intermarriage of Jacob Chapline and Elizabeth, at their instance, Lawson Moore was summoned by the county court, to make his account as guardian, never having rendered any. He exhibited his accounts to the commissioners of the county court, on the 30th September, 1820, which, when reported, the county court refused to approve.

Abraham Chapline and wife, Hannah, had, in September, 1819, exhibited their bill, to set aside the note obtained from her by Lawson Moore; in October, 1820, Lawson answered. Upon the coming in of this answer, Abraham Chapline and wife amended their bill, called for an account of the estate of William Moore, received by said Lawson, claiming the share to which the mother was entitled by the death of her son Allen Lawson Moore, making the other children parties.

The defendants, Jacob Chapline and wife, Elizabeth, and Robert M'Afee, and Ellen his wife answered, and made cross bill against Lawson Moore, Abraham Chapline and wife, and William B. Moore, charging Lawson with the recognizances given by him for the real estate, and charged him as having received considerable sums of the personal estate, and prayed for an account and settlement, and a decree for the balance due from him as guardian.

To this amended bill, and to this cross bill, Lawson Moore for himself, and as guardian to William B. Moore answered, and exhibited the account which had been rejected by the county court. He charges himself with the real estate only, from which he deducts a large sum for his salary, expenses of himself and horse in going to Pennsylvania, and to Westmoreland in Virginia, attornies' fees, copies &c. amounting to four thousand nine hundred and seventy dollars twenty eight cents, reducing the assessments of the real estate for which he holds himself accountable to \$15,074 24, one half of which he passes to the credit of the heirs of Geo. Moore generally. Against that moiety, he exhibits an account against the children generally, for charges and expenses, in removing them and their mother to Kentucky, amounting to the sum of nine hundred ninety-six dollars eighty-nine cents, leaving a balance of seven thousand five hundred thirty-seven dollars, twelve cents, as due on the 25th March, 1814; against this he exhibits his accounts for support and education, and articles furnished the children individually, including the receipt obtained from the mother by said Lawson, for her account

CHAPLINE
AND
MOORE, &c.

Bill of Chapline, and wife for surrender of her note to Moore, and amended bill for an account of Wm Moore's estate.

Answer and cross bill of the other distributees against Moore, for account.

Lawson
Moore's answer, and his account.

CHAPLINE
AND
MOORE, &c.

against the children. The account against his ward, Elizabeth, wife of Jacob Chapline, amounts to \$863 56; against his ward, Judith Ellen, wife of M'Asce, to \$762 52; against the deceased child, Allen Lawson Moore, including the funeral charges, to \$64 42.

Moore's cross
bill against
Chapline and
wife.

By a cross bill, the defendant Lawson Moore, prayed a decree over against Jacob Chapline, provided it should be found that the advances in money, and a tract of land conveyed to him, on account of his wife's share, should overgo her proportion. The receipt for this land is of the 24th April, 1821, for \$3375, and expresses that Jacob Chapline is to pay the surplus, if any, above his share, to Ellen Moore.

Decree of the
circuit court

The circuit court charges Lawson Moore with the sum of \$707, as half of the personal estate received by him, which added to the recognizances for the real estate, is made an aggregate of \$10,233 26, of real and personal estate for the shares of George Moore's children. Against this aggregate sum, the court allowed, as a credit to the guardian, \$1096 35, part of the account (N) (as stated in the commissioners report,) the whole being for \$1246 35, and allowed the sum of \$1389 72, part of the account (M) as stated in the report, (the whole of this account, amounting to \$4935 78.) These allowances, together with \$64 42, against Allen, deceased, are set off against the before mentioned aggregate of real and personal estate, so as to reduce the amount to \$7682 77. This reduced sum was divided between the surviving children of George Moore, to the exclusion of the mother, and from their respective shares thereof so produced, the accounts of the guardian against the children individually, were deducted. To M'Asce and wife, a balance of \$2,046 46, with interest at the rate of six per cent, from the 22d February, 1826, till paid, is decreed. The share of William B. Moore, is left in the hands of the guardian Lawson, until some person is lawfully authorized to demand it from him, subject to his future advances. Against Jacob Chapline and wife, the sum of \$1576 49, with inter-

est at six per cent, from 26th of February, 1826, till paid, is decreed in favor of Lawson Moore, as a surplus above the share of Ellen. The bill of Mrs. Hannah Moore, the widow, is dismissed, no part of the estate being allowed her, and the account and settlement complained of on her part, not having been deemed worthy of reform.

CHAPLINE
AND
MOORE, &c.

The guardian complains of the decree for not allowing the whole of her claims; the heirs complain of the allowances made, and of the short allowance for their share of the personal estate; the widow of George Moore, now the widow of Abraham Chapline, complains of the refusal to allow her a distributive share as one of the heirs of her deceased son, and of the affirmation of the note obtained from her shortly before her marriage.

Objections to
the decree by
the several
parties.

The following charges in the accounts, M and N, referred to in the decree, will exhibit the principal subjects of complaint against the decree, in fixing the sum for which Lawson Moore is accountable, as due on the recognizances.

(AC'T. M.) THE ESTATE OF WM. MOORE, OF CARLISLE, To LAWSON MOORE, DR.

Lawson
Moore's ac-
count against
his wards, &c

| | | |
|-------|--|----------|
| a-1. | 1812. To my services eight months, attending to the estate in Carlisle, \$333 33 | |
| a-2. | My expenses travelling to and from, and stay there this year, | 350 00 |
| a-3. | Horse expenses same time, | 150 00 |
| r-4. | My expenses travelling to Westmoreland county, in Virginia, to get the names, ages, &c. of said children, in order to lay in their claim to the estate of the deceased, William Moore; (commissioners' report states this trip to get affidavits to prove the heirs of the estate,) 100 00 | |
| | | —833 33 |
| a-5. | 1813. To my services 12 months, attending to the estate at Carlisle, | 500 00 |
| a-6. | My expenses travelling and stay there this year, | 350 00 |
| a-7. | Horse expenses same time, | 150 00 |
| | | —1000 00 |
| r-8. | 1814. To my services this year, 12 months, | 500 00 |
| r-9. | Expenses travelling and stay there this year, | 475 00 |
| r-10. | Horse expenses this year, | 180 00 |
| | | —1155 00 |
| r-11. | 1815. To my services this year, three months, | 125 00 |

| | | | |
|---------------------------------------|-------------|---|-----------|
| CHAPLINE | r-12. | My expenses, travelling and stay | 180 00 |
| AND | | &c. | 33 00 |
| MOORE, &c. | r-13. | Horse expenses, | 338 00 |
| Lawson | r-14. 1816. | To services this year, trip to Carlisle, on same business 3 months, | 125 00 |
| Moore's account against his wards, &c | r-15. | Expenses, travelling and living there, | 190 00 |
| | r-16. | Horse expenses same time, | 40 00 |
| | | | 355 00 |
| | r-17. 1820. | To services this year, attending to business of the estate at Carlisle, 2 months, | 83 33 |
| | r-18. | Expenses going and coming, self and horse, | 126 00 |
| | | | 906 33 |
| | a-19. 1814. | April 30. To cash paid James and Thomas Duncan, as per receipt and contract, | 915 74 |
| | a-20. 1812. | To cash paid for county seal, to affidavits and witnesses, | 3 00 |
| | a-21. 1814. | 29 April, Cash paid Ramsey, clerk orphan's court, per receipt, | 3 20 |
| | a-22. 1812. | To cash paid Chian, for copy of inventory, | 11 83 |
| | a-23. | —paid William Ramsey, clerk, on copies of confirmation of real estate, | 5 00 |
| | a-24. | —Sundry examinations of different offices, | 6 00 |
| | | | \$4935 78 |

(Act'. N.) THE HEIRS OF GEO. MOORE, DECEASED,
TO LAWSON MOORE, DR.

| | | |
|-------------|---|-----------|
| r-25. 1812. | To expenses travelling to Westmoreland county, Virginia, to lay in the claim of the heirs to the estate of William Moore, deceased, | \$150 00 |
| r-26. 1813. | To ditto, on 2nd occasion, to move the family to Kentucky, | 150 00 |
| a-27. | To goods purchased to clothe the family, | 90 37 |
| a-28. | To money expended in moving the family, | 356 50 |
| a-29. | To hire of Wagon and team, | 250 00 |
| a-30. | To cash paid John Smith's account for boarding, | 212 00 |
| a-31. 1814. | To cash paid Thomas Allen, clerk, \$1 90, and another fee bill of later date, 58 cents, | 2 48 |
| a-32. | To cash paid Thomas Urie, guardian, per receipt, | 15 00 |
| a-33. | To cash paid A. Caruthers, as per receipt, | 20 00 |
| | | \$1246 35 |

The summary of these accounts, and the sum with which the guardian charges himself, before he applies the advances to the surviving children separately, is thus:

LAWSON MOORE, TO THE HEIRS OF GEORGE MOORE,

| | |
|--|-----------|
| Dr. | |
| To one half of the amount of the valuation of the real estate, | \$9526 26 |

| | |
|---|---------|
| Cr. | |
| By half of the account, M, | 2467 89 |
| By account N, for expenses of moving the family &c. | 1246 35 |
| By guardian's account B, against Allen L. Moore, | 64 42 |
| | 3778 67 |

| | |
|---|---------|
| Balance due the heirs of George Moore, with interest from the 25th March, 1814, | 5747 59 |
|---|---------|

\$9526 26

After the foregoing accounts against the wards, charges numbered, 1, 2, 3, 5, 6, 7, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33, as here stated, were admitted by the court; number 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 25, as here stated, were rejected. Having allowed those items in the account, against the estate, one half thereof is charged by decree against the children of George Moore, and having allowed all of the account N, except one item, the whole of that is charged to the children. Thus for expenses of looking after the estate of Lawson Moore, has been allowed by the decree, \$1389 72, and for expenses of bringing the children to Kentucky, including three other small charges, the sum of \$1096 35, making together the sum of \$2650 49, which is deducted from the sum for which the guardian is to account to the wards separately, and thereafter the individual charges upon the wards are allowed.

Lawson Moore admits in his answer, of receiving some advances from the agent of the administrator *de bonis non*, out of the personal estate, at one time amounting to one thousand dollars, and other sums, which he says, he does not recollect; but has not charged himself with any portion of the personal estate, but resists his liability to the wards for that, because, he says, he gave a re-

CHAPLINE
AND
MOORE, & Co.

Items of the account allowed, and items rejected by the circuit court.

Money received by Moore from the administrator *de bonis non*.

CHAPLINE
AND
MOORE, &c.

ceipt for that, not as guardian, but obliging himself to refund it in case of a deficiency of personal assets, and because he expended the whole of the sum of \$1000, in removing the family to Kentucky. The deposition of Mr. Helpenstein, to whom this receipt was given by Moore, for the money, proves it to be for \$1414 50; but whether this receipt includes the whole amount of the personal estate received from Helpenstein, cannot be distinctly understood from his two depositions; it may, or it may not include the whole amount received from Helpenstein, the agent of the administrator *de bonis non*. The court charged the guardian with \$707, of this receipt. Thus it was, that the decree made the amount of real and personal estate, belonging to George Moore's heirs, \$10,233 26, from which was deducted the before mentioned allowances of \$2550 49; reducing the sum divided among the surviving children of George Moore, to, \$7682 79; this sum is made to carry interest from the time the recognizances for the real estate fell due, and against this the accounts for support and education are allowed.

Moore's objections to the decree.

After swallowing the whole personal estate charged upon the guardian by the decree, the allowances made to him in that decree have reduced the amount due on the recognizances for the real estate, by the sum of one thousand seven hundred and eighty dollars forty-nine cents, before the charges for support and education of the wards begin. But the guardian is not content with this, he has appealed, and insists upon his account as stated to the commissioner; he insists on the rejected items, and objects to being charged with any part of the personal estate.

Charges of Moore against his wards held to be outrageous, at first blush.

For the aggregate of his own expenses and services in the management of the estate the guardian of one half and owner of the half charges \$3939 33; half of this he charges upon the wards; and upon his wards, for removing them from Westmoreland to Kentucky \$756 50, together with the sum of \$915 74, for the fee to Messrs. Duncans, making an aggregate charge upon the estate of his wards of \$3641 40, not to mention peccadilloes. These charges are distinct from their support and education,

and not accompanied by one single correspondent increase of their estate. They are charges made by the guardian upon the wards, to reduce their moiety of the real estate due them by his own recognizances, entered into before the orphan's court as the purchaser. The expenses of his management thus demanded by his account, exceed one third of the estate of the infants.

CHAPLAIN
AND
MOORE, &c.

The charges are notoriously outrageous, at first blush. But it is said, the guardian has been in pursuit of the personal estate, with a view to prevent a sacrifice of the real estate. How stands that matter? In all this pursuit; with such copious charges for services rendered and for expenses, not a dollar of the personal estate has been acknowledged by the guardian as chargeable to him for the benefit of his wards. The benefit is speculative merely. In 1813, the wards had guardians appointed for them by the orphans' court of Pennsylvania resident on the spot, men of character and integrity, bound with sureties for the performance of their duties. The administration of the personal estate in Pennsylvania had been committed in 1812, before Lawson Moore's arrival in Carlisle, to men resident there, of known repute and responsibility, and they too were bound in bond, with sufficient sureties, in the penalty of sixty thousand dollars, for their faithful administration. The fear of insecurity of the real or personal estate was imaginary. It is a fear which a court cannot, under the circumstances, regard.

The attempt to remove the administrators, Messrs. Irvine and Given, seems to have grown out of L. Moore's eagerness to get the control of the whole estate, real and personal. But it is said that by his exertions the lands have been sold at a high price. Be it so, he has not been the loser. He took them at the price of \$19,052 52, and sold them for \$20,063; he sold two of the tracts for \$15,712, on the fourth of March, 1814, before his recognizances fell due or began to carry interest, and the third he sold on the 29th November, 1816, for \$4351, as is agreed by the parties. He has sustained no loss for which to ask remuneration; whereas the charges which he

Moore charges, for pursuing the personal estate into the hands of safe administrators and guardians in Pennsylvania, not allowed.

CHAPLINE
AND
MOORE, &c.

No one may
assume an
agency for an
infant and
thereby bring
charges and
loss on them.

asks against the infants, if allowed, would throw a loss upon them, to his great gain.

The allowances made by the court for services and expenses of 1812 and 1813, and charged upon the estate, amount to \$1833 1-3, the one half of which has been deducted from the purparts of the infants. This allowance cannot be approved by this court. Lawson Moore of Kentucky, the owner of one half the estate, chose to go to Carlisle to look after his own interest; he had never seen the children of George Moore; he did not know their names; he assumed an agency for them, unsolicited even by those having the custody and care of the children, and charges them with wages and his expenses. For such services the law will imply no assumpsit, nor will equity. It is contrary to the principles upon which courts of equity act in the exercise of their jurisdiction as the guardians and protectors of infants and their estates, to permit any one to assume an agency for infants, and bring charge and loss upon them by that agency.

Charges of
Moore a-
gainst his
wards, for his
travelling ex-
penses and
services in
Pennsylvania,
unjust.

In 1812, September, Lawson Moore sued out process for partition of the lands. According to the laws of Pennsylvania the lands are valued and the inquisition was returned into court, and at September term, 1813, he takes the lands at the valuation, as permitted by the laws of that state: the infants are there represented by their proper guardians of their estate, duly appointed by the orphans' court: and now he charges the infants for this. He instituted the process, the law took care of the infants, and provided them with guardians, and yet this person, who was no guardian, brings a charge upon the infants for supposed benefits by him conferred, in the pursuit of his own interest. At the same term of the orphans' court, the administrators presented an account of the personal estate, and upon inspection, the court declared the assets were ample to pay all debts. From this time forward the defendant was the sole owner of the real estate, he was the debtor to the infants, by the recognizances, for the value of their respective portions of the real estate so transferred by law to him, and he was cognizant of the account of the administrators, and of the suf-

iciency of personal assets to pay all debts. Up to this time he had acquired no claim upon the infants for his expenses and services in the management of the estate. He was neither administrator nor guardian then, the law had fully provided administrators and guardians to take care of the interest of the infants. From this time forward all his trips to Pennsylvania have not brought any increase of the funds of the infants in his hands which he is willing to account for. His charges for these trips are without colour of right.

CHAPLINE
AND
MOORE, &c.

The charges for removing the infants to Kentucky, are exorbitant, and without foundation for claim against the children for any part. Who asked Lawson Moore to remove the children from Virginia to Kentucky? What prompted him to remove them? His answer states he found them in poverty and obscurity: they were the children of his brother: "he will not attempt to describe his feelings on that occasion"—"he saw nothing of liberality or charity extended towards them"—to the mother "he gave it as his opinion that she could make out better to support herself and children in Kentucky than where she was"—"he informed her that he would do for them every thing in his power, and in case William Moore's estate should prove insolvent, he would support her out of his own estate; for at that time what would be saved from William Moore's estate was entirely uncertain; he most solemnly denies that he was actuated or influenced in those offers of friendship by any future pecuniary motive whatever." This is the account which he gives himself. The deposition of Barnett states, that Lawson Moore did promise Mrs. Hannah Moore that if she would move to Kentucky he would take her and her family out free of expense. A desire to better their situation, feelings for his relations, friendship, uninfluenced by any future pecuniary motive whatever, were his inducements to desire and advise the mother to remove herself and children from her father, and from "a most destitute and helpless condition," "where he saw nothing of liberality or charity extended towards them." These generous, liberal, charitable, and disinterested feelings of friendship and con-

Account of
Moore against his
wards, for removing them
and their mother from
Virginia to Kentucky, before he was
appointed their guardian, disallowed.

Argument
against this
charge for the
removal of
the widow
and children.

CHAPLINE
AND
MOORE, &c.

sanguinity were praiseworthy. Actuated by them, he says he removed the mother and the children to Kentucky. In the gratification of those feelings he looked for his reward. It is clear that the children could make no assumption to pay for their removal, and the mother could not for the children, and did not even for herself. But the uncle claims his compensation and pecuniary reward, because of the supposed benefit resulting to the children by removing them from a condition of want and obscurity in Westmoreland to plenty and light in Kentucky. They were not removed from Virginia until after Lawson Moore had become their debtor by the recognizances, for upwards of nine thousand five hundred dollars. That sum might have removed want and obscurity from them in Virginia. The light of the inheritance, glimmering upon them, discovered them to an uncle, who before knew neither their ages, names, nor existence. Judge Parker of Westmoreland, had agreed to undertake the guardianship of the children, and was prevented by their removal to Kentucky. Under the guardianship of Judge Parker, and the protection of their grandfather, who in their utmost need, had still given with good will, according to his means, the children might probably have done well in Westmoreland, and escaped heavy charges, and a law suit with their guardian, in coming at their inheritance. The mother there might have been instrumental in propping the decline of her father, who had been paternal to her and her children in their poverty. The mother and the children, there, might have escaped the wound inflicted upon their feelings by the unjust and unmerited assault which has been made, in this cause, upon the conduct of her father, to help out the charges for removing the children to Kentucky. If, however, they have done better, and grown more luxuriously, by being transplanted to the soil of Kentucky, those feelings of the uncle which prompted him to advise and undertake the removal, uninfluenced "by any future pecuniary motive whatever," will have received their own gratification. Under the circumstances, this court can see no foundation for raising a charge against the children for the expenses of their removal. He was not their guar-

dian; he had no power to command or direct their movements; as their uncle, he gave the advice and persuasion; he promised the removal as the courtesy of friendship and consanguinity; he was then their debtor by recognizances; he had no right to prescribe his own terms of payment, nor will equity help him to convert his arrangement with the mother into a charge upon the children.

CHAPLINE
AND
MOORE, &c.

The charge of ninety dollars some cents, for clothing to the mother and children furnished in Westmoreland cannot be allowed. At that time, Lawson Moore was not guardian; he was their debtor it is true; their estates were separate and distinct; those articles were incidental expenses of removal, bestowed upon the mother and children, without account as to how much to this and how much to that; with his own money and goods he had a right to be bountiful, but with the money of the infants, none. The time, the manner and the circumstances, bespeak it a bounty, a gratuity; his after appointment of guardian gives him no claim to charge these goods upon the infants and their estates in the aggregate. Persons are not to be encouraged to furnish infants with goods, as of good will and courtesy, and afterwards to charge them as for necessities.

Guardian may not charge his wards with clothing, furnished them before his appointment, as of good will and courtesy.

The credit of \$457 87 cents, for one half of the receipt of Messrs. Thos. and Jas. Duncan to Lawson Moore, dated 30th April, 1814, was also erroneously allowed. This receipt was given for nine hundred and fifteen dollars seventy-four cents, as paid by Lawson Moore, upon a contract by him with them, of the sixth of September, 1812, by which he retained them as counsel for himself and the heirs of George Moore, to support the interest of himself and co-heirs in the estate of Wm. Moore, deceased, in all cases where Messrs. Duncans had not been previously retained against the estate, they to have for their services five per cent upon the whole estate, real and personal, after payment of the debts and expenses. Upon this contract Messrs. Duncans passed their receipt, at the foot of an account of particulars, for the sum of \$9 5 74 cents. But this sum was paid partly by the accounts standing against them in the books of William Moore, deceased, as

Moore's charge against his wards, of one half the sum he paid counsel employed by himself, to represent him in the affairs of the estate, before he was appointed guardian; disallowed.

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appears by the face of the account, by the deposition of Mr. James Duncan and by the allowances to the administrators in the settlement of their accounts. The allowance made to Lawson Moore by the decree of one half of this receipt, has converted the amount of those book accounts, to the exclusive benefit of Lawson Moore, and moreover charges the one half thereof upon the shares of the children of George Moore. If it were proper to have allowed this contract of Lawson Moore with Messrs. Duncans, to charge the infants, yet those accounts should have been deducted from the amount of \$915 74, receipted for by Messrs. Duncans, as payments made out of the joint funds of Lawson Moore and the infants, and half the residue only carried to the credit of Lawson Moore, on his account as guardian. But by allowing a credit for half of the whole amount of the receipt, the heirs of George Moore have lost their moiety of the book accounts, and lost the like sum out of their shares.

Argument a-
gainst
Moore's
claim for
contribution
in the pay-
ment of his
counsel.

Messrs. Irvine and Given, from their appointment in 1812, to their resignation in September, 1813, accounted for the administration of \$23,151 74 cents; to which is added the commission agreed upon. They had in their hands, ready to administer, seven thousand four hundred and twenty-six dollars fifty cents, in money, a sum more than sufficient to pay all the debts subsequently paid by the administrator *de bonis non*. The administrators retained for their services the sum of \$1426 50 cents, according to the agreement of Lawson Moore, they passed over to the administrator *de bonis non* the rights and credits of the decedant, together with six thousand dollars in money. The administrator *de bonis non* charges himself with \$17,480 89 cents; the balance reported by former settlement, after deducting the allowance of \$1426 50, and for interest on judgments &c. \$757 28, making in all \$18,238 17, according to his settlement of 1822. Deducting the sum of six thousand dollars in money, and the debt (sued for and finally reported as lost, by verdict for defendant) of \$7983 40, which was put in suit by the former administrators against Michael Ege, and there remained the farther sum of \$4254 97 to be accounted for

by the administrator *de bonis non*; of this he reports a long list of insolvents and debits against him which were never collected, shewing that of the \$17,480 89, turned over to him by the former administrators, he had collected only about two thousand dollars, over and above the sum of \$6000, in money, received from the former administrators. Messrs. Irvine and Given, had in fact paid and provided the money to pay all the debts and more than enough, as early as September, 1813, and the orphan's court then declared of record the assets were amply sufficient; they did not resign until they had provided fully for all the creditors. Therefore, the real estate was secure from the creditors before Lawson Moore made his election to take it at valuation, and entered into the recognizances to the infants for their moiety. His after trips to Carlisle were not on account of the interest of George Moore in the real estate; that was his own by election. As to his attention to the personal estate, whatever it may have been, it was voluntary; it has been attended by no beneficial effect to the heirs of George Moore. Of the administrator *de bonis non* he received fourteen hundred dollars and upwards; the administrator *de bonis non* has suffered him to discount with Messrs. Duncans their book accounts against the contract of Lawson Moore of 1812, and the administrator *de bonis non* has paid to Messrs Duncans their per centage, on the amount of the personal estate remaining after debts and expenses, which remained unadjusted by the receipt of April, 1814; he has paid the additional two and a half per cent to the former administrators; the account of his administration was not presented to the orphan's court until the 12th December, 1822, and the balance therein reported for distribution, the guardian by his answer does not admit he has received. In all this, there is no benefit resulting to the infants by any operations of Lawson Moore, so far as this court can see. In the settlement of the administrators, Irvine and Given, Lawson Moore agreed to give them for their services and for resignation, five per cent on the moneys collected by them, and two and a half per cent on the monies to be collected by their successor; these

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sums are allowed in the settlements, \$1426 50 in the first, \$47 25 in the last; the administrator *de bonis non* has been allowed for his services \$300, and there is allowed to Mr. Caruthers for his services as attorney and counsellor at law, the sum of \$245, and to other gentlemen of the profession, sums amounting to \$90, have been allowed in the two settlements with the orphans' court. To attorneys and counsellors, the sum of \$335: to the administrators upwards of seven-hundred dollars; making together \$2,108 75 cents, already paid out of the personal assets by the administrators. If this receipt and contract of 1812 of Messrs. Duncans and Lawson Moore be added, then the whole would be \$3096 20 cents, (the receipt of \$915 74, and the commission on the balance of personal estate \$71 71,) making the allowance for attorneys and counsellors fees \$1322 45.

It is the duty of executors and guardians to employ able counsel, and they will be allowed in their accounts the customary charges for such services.

It is the duty of executors, administrators or guardians, in suits necessarily to be prosecuted or defended, to draw to their aid the services of men learned in the profession of the law, and for so doing they should be allowed, in settling their accounts, such sums as are usually paid for like professional services by men ordinarily prudent in their own affairs, provided they have actually employed gentlemen of skill and ability and have actually paid for their services. In the settlement with the orphan's court such fees have been allowed. But when such fees have already been allowed, and deducted out of the estate, to the credit of the administrators, the allowance of the additional sum claimed by Lawson Moore, by reason of the contract of the 6th Sept. 1812, and receipt founded on it, would be extravagant. It cannot be traced to any equitable principle. When Lawson Moore made that contract he was not the guardian of those infant children; that contract was not necessary nor beneficial to the infants, so far as this court can see from the circumstances appearing in the record. The real estate was not in litigation; the administrators, Messrs. Irvine and Given, were men of integrity, fair character, responsibility, and were men well skilled in business; they had given ample security for the faithful discharge of their duties. The administrators, the better to discharge

their duties, and knowing that some demands were already disputed, retained as their counsel in all cases, Mr. Caruthers, a gentleman of integrity and having the reputation as standing among the foremost in his profession; for his services, as well as for the occasional services of others, allowances have been made in the accounts as settled by the administrators before the orphan's court. The acts of the administrators in employing counsel in the legal affairs and management of the estate were the acts of the fiduciary legally constituted to take care of estate. The employment of Messrs. Duncans by Lawson Moore was an act of his own; he was not a fiduciary; he was neither an administrator nor a guardian; he had no trust to act for the infants.

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It is true that Messrs. Duncans were gentlemen of integrity, and standing among the first in the profession of the law, but the act of Lawson Moore in employing them grew out of a desire to get the control of the estate; he desired to get possession of the stock of merchandise to bring to Kentucky, this the administrators would not permit; he conceived a jealousy and suspicion, (unwarrantable as it appears to this court,) of the administrators. Either Mr. Lawson Moore's eagerness to come into quick possession of the estate, or his suspicion of the administrators, (although men of the first respectability and established good character,) or his distrust of the powers and capacities of the constituted authorities of Pennsylvania to enforce a faithful administration, or the damages in case of default in the administrators, produced the contract of 1812, with Messrs. Duncans. This court cannot give in to any such distrusts or apprehensions. The interests of the infants was placed upon a sure and stable foundation by the act of the law, in appointing administrators capable and trust worthy, and binding them also by very sufficient sureties. Mr. Lawson Moore attempted to remove the administrators; his application to the court failed. It was to the interest of the infants to have their inheritance under the management of agents appointed by law and bound for a faithful account; they were incapable of managing it for themselves; it was the interest of Mr. Lawson Moore

Guardian not allowed to charge his wards with fees of counsel unnecessarily employed to represent him as their co-distributees, before his appointment to the guardianship.

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to manage his inheritance for himself; he was capable; the infants could not act, and must be passive to the ordinances of the law for their safety; here the interests of Mr. Lawson Moore and the interests of the infants separated. The Pennsylvania administrators and Pennsylvania guardians were safe agents for the infants; Mr. Lawson Moore was eager to be his own agent as to his interest in the estate.

Moore's
claim for part
of his coun-
sel fees, disal-
lowed.

The dissimilarity of interests and capacities in conducting the affairs, caused Lawson Moore to sue the writs of partition, and upon their return to become the sole owner of the lands, and bound to the Pennsylvania guardians, in the recognizances—thus he obtained the control of the real estate. By contract he induced Messrs. Irvine and Given to resign, and Mr. Leonard came in, as administrator *de bonis non*; this was in September, 1813; the children were yet in Westmoreland; in the winter of that year he brought them to Kentucky and after become their guardian. As guardian and debtor to them by recognizances, their interests were not very similar; but as guardian for the infants who inherited one moiety, and as heir of the other moiety, on his return to Carlisle, in 1814, he controlled the whole estate; he retains personal estate under a refunding receipt; he discounts with the Messrs. Duncans their book accounts, his contracts with them and with the former administrators, are carried into effect by the administrator *de bonis non*; his accounts remain open until December, 1822, and the accounts of Lawson Moore as guardian are yet in litigation. In all this we are unable to perceive the benefit which has resulted to the infants by any agency of Lawson Moore in the management of the estate, upon which the contract of 1812, and the receipt grounded on it, can or ought to be for any part decreed against the infants.

Charges of
the guardian
for an ac-
count in the
name of the
grandfather

The next item of the guardians account, is that referred to in the commissioners report, account N. No. 8 and exhibit D. It is an account stated by the grandfather, Smith, against the orphans of George Moore, deceased, for boarding, at fifty dollars each, in 1813, and schooling Elizabeth and Allen Lawson;

six dollars, amounting to two hundred and twelve dollars, dated 15th November, 1813, with an order to the guardian of the orphans to pay it to Mrs. Hannah Moore, dated same day, with a receipt subscribed with her name, as having received it of Lawson Moore, guardian, on the 12th day of March, 1814; to this the wards excepted, because they owed Mr. Smith nothing, and because the account is not proved. This account is dated about the time of the departure of Mrs. Moore and her children from Westmoreland. There is no proof of the justice of such account, nor of payment of it; the answer, the circumstances and the depositions repel the justice of the demand.

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against the
wards for
boarding &c.
rejected.

The charges for copies obtained in 1812, amounting to \$22 83, were excepted to by the wards, as not supported by any proof, and if obtained were for the defendant, Lawson's, own benefit; the copies are not produced as called for, and there is no evidence to sustain the charge. In 1812, Lawson Moore was not the guardian. These are disallowed by this court.

Item for co-
pi-
s of papers
not allowed.

The fee bills of Thos. Allen, are for services rendered Lawson Moore himself, but describing him as guardian, the one for entering his attorney, in this suit against him as guardian, and for a copy of the order appointing commissioners to settle his accounts. The other is for a copy of his appointment as guardian, with the county seal &c. These are disallowed by this court.

Fee bills a-
gainst the
guardian, not
allowed a-
gainst the
ward.

The charge for county seal to affidavits, is not a proper charge against the infants. These are affidavits taken in Jefferson county, Virginia, to prove Lawson Moore the heir—the children of George Moore, or that he left any children, are not stated in any one of the affidavits.

Expenses of
affidavits, re-
jected.

The charge for Wm. Ramsey's receipt, as clerk of the orphans' court, is disallowed; the services were rendered for Lawson Moore himself and not for the benefit of the heir; the charge is for entering satisfaction, acknowledged by himself as guardian, upon his recognizances to the children for the price of the

Fee of the
clerk of the
Orphan's
court for ser-
vices render-
ed the guar-
dian, not al-

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AND
MOORE, &C.

lowered against
the ward.

land, and filing the evidence of his guardianship— for this purpose, no doubt, the copy of his appointment, with county seal, was obtained, according to Mr. Allen's fee bill on the 5th of March, 1814, and filed in the orphan's court of Pennsylvania on the 29th April, 1814.

The receipt of the 26th October, 1813, for one dollar twenty-five cents, is disallowed by this court; there is nothing in the cause, nor on the face of the receipt, to shew what the tax was for, or that the heirs of George Moore were bound for any part of it.

The sum of \$15, paid to Thos Urie, the Pennsylvania guardian, as by his receipt, is allowed; so also, the receipt of Andrew Caruthers for \$20.

Guardians shall not be allowed accounts against his ward to effect the capital of the infant—the income may be anticipated, and in extraordinary cases part of the capital appropriated by an order from the chancellor, not otherwise.

These accounts, M and N, were the great subjects of litigation between the parties, the decision upon them is preliminary in its nature, for if Lawson had been entitled to the credits claimed upon these accounts, it would have materially changed the credits to be allowed for maintenance of the infants. A court of equity never sanctions the conduct of a guardian to break in upon the capital of the infant's estate, by his own authority; the court may be applied to under extraordinary circumstances, and has rarely permitted by its own order a reduction of the capital; the circumstances must be cogent and extraordinary to induce the court to assent to break in upon the capital; the income may be anticipated under suitable circumstances, but for the mere purpose of maintenance of a child in health and infancy, a court of equity will not permit a sinking of the capital. Cases of hardship may occur where the estate of the ward is not sufficient for maintenance and education out of the yearly profits or interest, but it is better that an individual should suffer such a hardship, than to break through a general rule, to the endangering the interests of all infants. The claims of the defendant upon these accounts of general charges are against established rules for the safe keeping of the estates of infants and the control of their guardians.

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MOORE, &c.

Moore's
claims a-
gainst his
wards for ser-
vices before
his appoint-
ment to their
guardianship,
held to be un-
just.

Before he was guardian, he says, he rendered services, which were beneficial by converting the land into money at a high price; that was done under the authority of the laws of Pennsylvania, and in pursuance of his writ of partition; by that he became bound in the recognizances for the value of their part, otherwise he could not have converted their lands into money, not even if he had been their guardian; upon a mere speculative opinion of what the value of the estate might otherwise have been, this court cannot act for the purpose of releasing a part of those recognizances; but for that proceeding, the infants would have had precisely what they inherited; he has chosen to take it at its appraised value, and upon the terms prescribed by law; there that matter ends. His claims after that time are very extraordinary; before he brought the children to Kentucky, he owed them \$2381 56 1 2 cents each, with current interest after the 25th March, then ensuing, amounting together to \$9526 26 cents. Being so indebted, he brings the children from their native place to another State, for this he asks this court to allow him, one hundred and fifty dollars for the arrangement, two hundred and fifty dollars for the use of a wagon, and three hundred and fifty-six dollars and fifty cents, for expenses for thirty-nine days, making in all, seven hundred and fifty-six dollars, and this he asks by way of reducing the capital; neither the father nor the mother, nor the guardian, would be allowed for such a charge, neither can one standing in the attitude of the defendant. But for what did he bring them to Kentucky? To become their guardian. Having become so, he enters an exonerature upon his recognizances, and when he is brought to account, as a court of equity to permit him by his guardianship, to reduce the capital, by the sum of \$3778 67, for services and his own expenses, independent of the maintenance of his wards, and having so reduced it, his accounts for maintenance each year overrun the annual interest; this is not permissible. The only reason offered by the defendant in this case is, he has been hunting after the estate, but has not charged himself with any thing as the beneficial result to the infants, for such extravagant waste of their estates.

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MOORE, &c.**

Facts of the
case between
Moore and
the widow,
mother of his
wards, and
his claim for
their main-
tenance.

In settling the questions between Mrs. Hannah Moore, now Mrs. Chapline, and the defendant Lawson, her claims upon her children, and her claims upon the defendant Lawson, are inseparably connected. Lawson Moore, the guardian, placed Mrs. Hannah Moore in a house of his in the country, with the use of the curtilage, a small garden, and a small lot of ground, the whole tenement between four and five acres; he furnished her with such articles as were necessary for house keeping, and with supplies of provisions &c. for the subsistence of herself and children, from about the 1st January, 1814, until her marriage with Abraham Chapline, in 1819. Lawson Moore admits in his answer, that she was destitute of support in Virginia, except by her labor and the assistance of her father: that he induced her to come to Kentucky with her children, by promises of friendship, and that if William Moore's estate proved insolvent, he would support her out of his own: that he told her he would provide her a place, and a negro boy to assist her, but afterwards when the prospect of the estate became brighter, that it was understood that her boarding of the children would enable her to pay the rent and the hire of the boy, and this before she left Virginia; but he denies that he promised her the house and boy free of charge. That Mrs. Moore was left destitute by the death of her husband, and that she lived in a house provided for her by her father, and supported her children in Virginia, by her own industry is clear from the proof, as also, that she was reluctant to part with her friends, but was induced to come to Kentucky by the promised friendship of Lawson Moore; but the proof goes only to state that herself and children were to be brought to Kentucky clear of expense; friendship and assistance in Kentucky was promised; but the proof does not go so far as that Lawson Moore was to provide her a home free of rent. The proof is clear, that in Kentucky her children lived with her, that she was industrious, frugal, spun and wove, and provided them with clothing manufactured at home. That she was promised by Lawson Moore, the guardian, compensation for the maintenance of the children out of their estate, and

that he furnished the supplies with a view, on his part at least, to compensation from the estate of his wards.

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MOORE, &c.

As to the mother's right to compensation out of the interest yearly accruing to the children, there is no difficulty, for her needy circumstances are clearly made out, as well as her industry and prudence for the support of her children. Although parents are under a natural obligation to support their children, and therefore, in the general, no allowance will be made, to father or mother in capable circumstances, out of the separate estate of a child; yet to the mother, and even to the father in distressed circumstances, a suitable allowance will be made for the support of the child. When that suitable allowance is ascertained, Lawson Moore is entitled to have it applied in account between himself and Mrs. Moore, and when that account is settled, then he is entitled to credit with his wards for so much, as he has paid on their account in satisfaction of their dues to the mother.

Parents under a natural obligation to maintain their children, will not be allowed for their support out of the children's estate, except where the distressed circumstances of the parents require it.

Standing in this attitude, Lawson Moore furnished the mother with various articles, of the product of his farm, and merchandise &c. from time to time, for four years, without agreement as to price. Very shortly before the marriage of Mrs. Moore with Abraham Chapline, and with a full knowledge of the intended marriage, Lawson Moore, stated an account of great length against Mrs. Moore, amounting to nineteen hundred and twenty-five dollars; he stated an account for her against himself, as guardian of the children, for boarding, washing, mending and making cloths, viz: against Elizabeth for four years, at \$54 per year, \$216 for boarding; washing, mending and making cloths, two years at six dollars, \$12, \$228; against Judith, for five years boarding, at same rate, \$270; washing, mending and making cloths, at six dollars per year, and finding some clothes, six dollars, \$36, \$306; against William, boarding four years and one month, at same rate, two hundred and twenty dollars fifty cents; washing, mending and making for five years, at six dollars per year, and finding him clothing five

Moore's account against his ward and their mother, and his settlement with her

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years, at five dollars per year, \$55, \$275; total against the three, \$809; there is added, "to sundry clothing furnished for children for six years, omitted heretofore, 250 dollars:" to making sundry clothing &c. 50 dollars; to boarding up to this 25th March, 1819, 40 dollars; total \$1139. To each child's account, is then added one hundred and thirteen dollars more, in figures without explanation, supposed however, to be one third of the three additional items, added after the first summing up, so that Eliza's account is 341; Judith's 419 dollars, and William's 389 dollars; upon this account against himself, is endorsed, L. Moore's account against Mrs. Moore, up to this time, 1708 dollars, amount of Mrs. Moore's account "for boarding, clothing &c. up to this time, \$1139; balance due L. Moore, \$574;" for this sum of eleven hundred and thirty-nine dollars, he took Mrs. Moore's receipt to himself as guardian, and her separate note to himself for 574 dollars, expressing that it was upon a settlement of that date, and for the balance of his account for things furnished "since I came to Kentucky." Lawson Moore charges each of the children with the amount so stated against them respectively in this account, and exhibited Mrs. Moore's receipt on it as his voucher. Mrs. Moore, now Mrs. Chapline, exhibited the account so made against her, and prayed for relief against this settlement and note.

Settlement
made by
Moore with
the mother of
his wards on
the eve of her
second mar-
riage, and the
notes taken
thereon, set
aside for its
iniquity and
his imposition
on her confi-
dence.

This settlement cannot stand. It was founded in mistake and ignorance of her rights on the part of Mrs. Moore, and an imposition on her weakness and confidence in Lawson Moore; it was in fraud of the contemplated marriage, and of the rights of the children. Mrs. Moore could not write, and was incapable of settling without assistance such accounts; no person but herself and Lawson Moore was present at this transaction, although others were in the adjoining room, and were called in to witness the receipt and note, her daughter signing her mother's name.

Moore's ac-

In this account, she is charged with a horse, saddle and bridle, furnished her brother John on her

father's order, and his expenses to this country, at one hundred and seventy-five dollars; this is the order spoken of for 212 dollars, of the 15th November, 1813, and Mrs. Moore, in her needy condition, is charged with her brother's expenses, and with a horse, saddle and bridle, which she never got, and upon an order which cannot be allowed against the children; she is charged with her brother's funeral expenses, to the amount of twenty-eight dollars, and with Doctor Hunn's account against her brother, thirty-five dollars, the whole charge on account of her brother, amounting to two hundred and thirty-eight dollars.

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MOORE, &c.

count against
the brother of
his wards'
mother, not
allowed.

Upon the death of Allen Lawson Moore, under age, unmarried and intestate, his share of the estate of William Moore, passed to the mother, brothers and sisters, according to the laws of Kentucky. Allen, the infant son, was domiciliated and died in Kentucky; the estate was personal, and passes according to the law of the country wherein he was domiciliated, and died, (*Embry vs. Miller*, 1 Marsh. 300.) Allen died in the year 1814, and from that time his mother became entitled to her fourth part of his estate; this was not brought into account.

Personal estate of the deceased, wherever situated, passes according to the laws of the country, where the owner was domiciliated at his death. Here such estate of one dying unmarried and intestate and without father, passes to the mother and brothers and sisters.

Again: the note, account and receipt taken by Lawson Moore, purport to be for things furnished since she came to Kentucky; instead of 1925 dollars, Lawson Moore's account is stated at 1708 dollars, and the credit allowed her, stated at \$1139, instead of \$1350, as in the account furnished to her; thus the order on the account, against the children whilst in Virginia, and the horse furnished in Virginia to her brother on that order, are kept out of view, and that order of Mr. Smith left to be exhibited against the children as paid by the guardian. By this account the children after being charged from January 1st, 1814, with boarding and clothing up to the 25th March, 1819, are then charged with an additional sum of three hundred dollars, for six years clothing omitted, and making sundry clothing, et ceteras, running back by this charge for six years, to March 1813, before the children came to Kentucky. The credit of 212 dollars, for 1813, and the sum of 300 dollars, in the receipt as taken from Mrs. Moore, would charge the children with 512 dollars improperly.

Error in
Moore's settlement with
his wards' mother.

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AND
MOORE, &c.

Charges against the wards, disallowed, because made partly for their maintenance before their estate fell to them, and because the proper expenditure would be thereby exceeded.

Accounts against the wards settled.

Amount the guardian had received of the administrator being left uncertain above a certain sum, ordered that his account for that sum and the claim of the wards against him, or the administrator stand, unprejudiced for the balance.

The sum of 212 dollars, cannot be allowed, for the reasons before mentioned; the charge of 300 dollars, this court is of opinion should not be allowed, because part of it is for the year 1813, before the children had any income, before the mother had any claims for allowance, and if allowed, the sums to the mother, and the sums charged by the guardian, independent of the mother's allowance, when added, would exceed a proper expenditure annually upon the children, and the allowance first stated at the rate of sixty dollars per year for boarding and clothing by the mother, is a liberal allowance out of the estates of the wards, when compared with the kind of clothing which the mother could furnish, and with the supplies furnished by the guardian.

This requires that the account stated by Lawson Moore, for Mrs. Moore, against each of the children, should be abated by one hundred dollars; the residue of the charge of \$113, seems to have been added for boarding from January, to 25th of March. The mother's account, against Elizabeth, will be reduced to two hundred and forty-one dollars fifty cents; against Judith, to three hundred nineteen dollars fifty cents; against William, to two hundred eighty-nine dollars. These deductions require correspondent reforms in the guardian's accounts against the children.

Although the guardian has not by his answer, exhibited an account of the personal estate which he did receive, and denies he is, as a guardian, accountable for it, yet he admits he did receive a part of the personal estate on a receipt to refund it, in case of deficiency. By the deposition of Helpenstein, and by the answer together, it is plain he did receive \$1414 50, but whether that sum includes all he received, cannot be told. By the final settlement of the account of the administrator *de bonis non*, it does appear, that there is in his hands for distribution, the sum of \$1134 24. This account, however, was not settled with the orphan's court of Pennsylvania, until the 12th December, 1822, after answer filed in this cause. It does not appear that the guardian has received that balance, so far as it

exceeds the receipt given in 1814 to Helpenstein; it is clear however, that the account so reported by the administrator *de bonis non*, has carried to the credit of the administrator, the sums which Lawson Moore paid to Thomas and James Duncan, on his contract with them, by means of the accounts which they owed William Moore, deceased, discounted as proved by Duncan's deposition, and by the receipt for \$915 74, of which those accounts compose a part; the administrator *de bonis non*, has also received a credit for the additional two and an half per cent to Messrs. Irvine and Given, by virtue of Lawson Moore's contract with them; also a farther sum paid Duncans upon Lawson Moore's contract, and charged by the administrator *de bonis non*, against the estate. All these sums so paid on Lawson Moore's contracts, diminished the balance in the hands of the administrator, and are proper charges against Lawson Moore, in settling his account with his wards. But the difficulty is to ascertain whether these sums are, or are not, included in the receipt of \$1414 50, spoken of by the answer, and in Helpenstein's deposition. Therefore, it seems proper to charge the guardian, Lawson Moore with one half of \$1414 50, the amount so receipted for by him, and to make a decree without prejudice to the claim of the heirs of Geo. Moore, to any farther sum which they have a right to have, either from the guardian, Lawson Moore, or against the administrator *de bonis non*, or against the Pennsylvania guardians, who are beyond the jurisdiction of the court of chancery in Kentucky. Thus the sum of seven hundred and seven dollars twenty-five cents will be chargeable against Lawson Moore, as guardian of George Moore's children, on account of the personal estate so received by him.

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AND
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Of all the charges by the guardian made against the estate of William Moore, deceased, and against the heirs of George Moore, as stated in his answer, and as stated in the accounts of the commissioners M and N, (independent of the separate accounts against his wards,) this court allows but two items, the receipt of Urie for fifteen dollars, and that of Caruthers for twenty dollars, these to be defrayed

Items allowed
the guardian.

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AND
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Guardian's
account a-
gainst Allen
L. Moore, ad-
justed.

equally by the four children of George Moore then alive.

In the account of the guardian against the ward, Allen L. Moore, the whole of Doctor Hunn's account is charged to Allen, whereas, upon the face of the account, only thirty-one shillings are for medical services to Allen, the residue for services to William B. Moore. Making this correction, the account against said Allen, is reduced, for support, education, funeral expenses, &c. to sixty dollars forty-two cents, to which is to be added his share of Urie's and Caruther's account above mentioned, making eight dollars 75 cents, in the aggregate, sixty-nine dollars seventeen cents, charged upon Allen L. Moore's share of the real and personal estate.

On the death of one of several distributees the others cannot claim his share of his guardian or the administrator directly, but there must be an administrator to receive and distribute it.

Upon the death of Allen L. Moore, an infant unmarried and intestate, his share was of right to be distributed among his mother, sisters and brother, in equal proportions. So that upon the death of Allen, the shares of Elizabeth, Judith and William, each received an accession of \$595 39 cents, on account of the recognizance to him, for his part of the real estate, together with the interest thereon, running from the 25th March, 1814, at the rate of six per cent per annum, and also, an accession of his share of the personal estate, deducting therefrom the charges against him, of sixty-nine dollars seventeen cents; the balance to be distributed, is \$107 70, which divided between the mother, brother and sisters, gives to each \$26 92, and the mother is likewise entitled to her share, of 595 dollars 39 cents, on account of the recognizance aforesaid for the real estate, with like running interest as above. These shares of Allen Moore, deceased, however, in the hands of his guardian, although to be distributed to his mother, brother and sisters, ought to have been sought by them of the administrator, who is the proper representative of the personal estate; to that end the administrator of said Allen, appointed, or to be appointed, must be made a party.

As to the shares of the personal estate charged upon the guardian, they ought to carry interest from the time that Lawson Moore received the per-
Interest to be accounted for

sonal estate, which appears by the deposition of Heipenstein, was receipted for as early as 1814.

Against the shares of the said wards, the guardian will be entitled to his accounts against them respectively for schooling and clothing, and maintenance when properly adjusted; to that end the accounts should be referred to a commissioner to state and report.

The receipt of Mrs. Moore to Lawson Moore, and her note to him for the balance, so as aforesaid stated, upon the settlement in the bill complained of, must be cancelled, and annulled, and the accounts between them, should be referred to a commissioner with power to take testimony and state the accounts accordingly, with direction to report the testimony, and his decision and statement of the accounts for the inspection and revisal of the court, so as to enable the court to make a final decree.

The debt claimed by L. Moore, now the widow Chapline, not having been collected of her husband Abraham Chapline in his lifetime, has now again become the debt of Mrs. Chapline the widow, so that the executor, or administrator of Abraham Chapline, is not a necessary party.

From the testimony, it seems that Lawson Moore having in his hands, after the death of Allen L. Moore, the fund belonging to Mrs. Moore, the mother, has kept her ignorant of her right, charging extravagant prices for articles furnished, so as to swell an account against her and the children. Having a large sum in his hands due the wards, he has charged them with articles at credit prices; suffered the wards themselves to have accounts in the store; his accounts are stated very loosely; his account for boarding, drawn up for Mrs. Moore, the mother, and receipted by her to him, and charged by him to the wards, includes, probably portions of time for which he has again charged boarding in other accounts; in the account of Elizabeth, he has charged her with Miss Bradburn's account, and the same charge is repeated in the account of E. Moore & Co. Although required by statute, to account annually

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by the guardian.

Guardian to be allowed his account for the schooling and maintenance of the wards, to be settled by a commissioner.

Settlement of Moore with his wards mother set aside, and ordered that the account be referred.

Debts against a firm, not recovered of her after married husband, on his death survive against her, and his administrator is not liable.

Animadversion on the guardian's accounts, and the duty of the chancellor in the protection of infants.

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to the county court, whose duty it is to put the surplus of each year's income, above the support and maintenance of the ward, to interest, (1 Digest, 643,) the guardian failed to render any account from 1814, until summoned in 1820, and then his accounts are very loosely stated; his claims for salary, for twelve months in this year, and twelve months in the next, include periods when he was at home; he charges for the same trip twice, with other examples of carelessness and inattention; besides his exorbitant claims for services and expenses, from 1813 to 1820, are applied by relation to the 25th of March, 1814, so as to reduce the capital and stop the interest. His accounts against his wards, are stated with a carelessness that runs to waste, and an extravagance that tends to devour, insomuch as to call for animadversion and strictest scrutiny of a court of chancery, whose especial duty requires of them to take care of infants and of their estates.

Commissions
refused the
unfaithful
guardian, and
the exemption
from the compound-
ing of the in-
terest on him,
allowed for
his only com-
pensation.

Decree and
mandata.

As to the claim which has been urged in argument for commissions, for the care and trouble of the guardianship, the only allowance which this court can make, is to forbear to charge interest upon the balance of each year's income, in the hands of the guardian, exceeding the annual disbursements for the wards, so as to charge him with only the simple interest running on the capital in his hands.

It is, therefore ordered, and decreed, that each and every of the decrees made in the cases aforesaid, be reversed and annulled, that the cases be remanded to the circuit court, with leave to the complainants, Mrs. Chapline, Jacob Chapline and wife, and Robert M'Afee and wife, to amend their bill so as to make the administrator of Allen L. Moore, deceased, (who has been, or may be appointed) a party, and for such farther proceedings, orders and decrees to be had, made and pronounced as may consist with the principles and directions expressed in the foregoing opinion, and with the principles and usages of equity.

Lawson Moore to pay the costs of each appeal.

The counsel for Lawson Moore moved the court for a re-hearing, on the following Petition for a Re-hearing by CHAPLINE
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MOORE, &c.
JAS. HAGGIN, Esq.

It is true that the sum in controversy in this cause, is sufficient to threaten the pecuniary ruin of Lawson Moore, but to a man who has passed the meridian of his life, and whose moral integrity has never yet been questioned, the effects of the opinion pronounced, in a pecuniary sense is no longer the chief consideration. This being a suit for an account, the counsel for the defendant had apprehended nothing involving character would be earnestly pressed. They had, they will acknowledge, discovered some indications of bitterness in the record, but this they supposed foreign from the questions to be decided, and had neither expected to vindicate their client from unjust aspersions, nor to minister to his possible gratification by animadversions upon his adversaries. And indeed, when remarks of counsel derogatory to the motives of the defendant, would have been answered and his conduct reconciled, the counsel was deemed out of order, and accordingly silenced. It was, therefore, certainly with surprise and regret that they witnessed the severity of remark with which the opinion abounds. His case is of peculiar hardship. Whatever is said of others, witnesses, attornies, administrators, guardians, of the many personages brought into review, (and they are numerous,) all receive the encomiums of this honorable court, except Lawson Moore. He is lacerated with an ingenuity and severity rarely displayed. We are obliged in justice to the man to say that we trust he will yet be found not to have merited so much asperity. Nay, we do find an exception, in the high estimation put by the court upon some of the witnesses. The opinions and advice of eminent lawyers, under whose counsel Moore deported himself in Pennsylvania, affords no mitigating circumstances worth a name; and the receipt of the grandfather Smith, for the board of the wards before Moore became their guardian, notwithstanding the high virtues the grandfather appears to have displayed, avails nothing when it would exonerate Moore of the payment of \$212 a second time.

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But we would not multiply remarks, perfectly recollecting, that we have already trespassed in the argument of this cause.

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It is supposed that the journies of Lawson Moore to Carlisle, and his stay there, and his disbursements and compromise with the first administrators, and the efforts expediting the sale of the land, were all useless—the effect of groundless jealousy, inordinate solicitude to get possession of the effects, and productive of no beneficial result. On the contrary, we would have taken it for granted, in the absence of all proof, that a man of ordinary prudence, advised of the death of a connexion, who had been largely engaged in trade, would visit the state of his residence and there ascertain the condition of his affairs. Such must have been the reflections of Lawson Moore, whose circumstances in life and whose habits were averse to a distant and expensive journey; still he went, surely not from any exceptionable motive. When he arrived at Carlisle he found Given, who was no creditor or friend, the active administrator. And although his son, who lived with William Moore, as his nephew, recognized Lawson as his father, and although Lawson Moore had with him letters of James Morrison, William Morton and Alexander Parker of Lexington, well known at Carlisle, still Mr. Given took pains privately to disparage him, by insinuating that he was a drunken impostor, and to discourage him as to his prospects from the estate of his brother, by discrediting the books, and by the exhibition of an entry in pencil marks and an unknown hand, representing William Moore to have been a partner with a Bankrupt of the name of West—refused him free access to the books, or the liberty of taking copies or extracts. This administrator entered into an amicable arbitration with a youth of the name of Frazier, who had been raised in the store, and without the knowledge of Lawson Moore, permitted a recovery for upwards of \$700, when in truth Frazier, by his own deposition taken in this suit, was only entitled to about \$200. They entered into a similar arrangement with a dissipated youth of the name of Hoines, and went into trial, and permitted an award for up-

wards of \$300, without affording to Moore or his counsel an opportunity to defend, although Duncan, who is admitted to be eminent in the profession, hearing of the demand, had expressly made known his ability to defeat it, and the latter judgment was arrested by a positive and unwelcome interference on the part of Moore and his attorney. The attorney of the administrators refused to commune with Moore in relation to the affairs of the estate, and for this but one cause can be assigned, to-wit, the collision between the heirs and the administrator. They advertised a sale of the goods under the most propitious circumstances, the season, the demand of distant merchants, then in attendance, and the probability of a peace, all required an instant sale, but consumed several days with remnants, and then postponed the sale for several weeks, notwithstanding the remonstrance of the heirs, and ultimately Mr. Given, the active administrator, and this same Frazier became large purchasers. These combined with many other circumstances, created and confirmed suspicions on the part of Moore and his counsel, who are admitted to have deserved his confidence. highly injurious to the integrity of Mr. Given. And thus admonished by facts, and under the advice of his counsel, Moore deemed it due to himself and co-heirs to obtain the earliest possible control of the estate. True he had an additional motive for expedition—land in that country, as in this, had acquired an estimate surpassing all experience, and Moore and his friends deemed it very important that he should avail himself of that crisis, and the land could not be sold until it was ascertained, that the personal estate was equal to the demands of creditors. Therefore, Moore with the advice and concurrence of the lawful guardian, the legitimate representative of the heirs, agreed to give the administrators five per cent upon the monies, and two per cent upon the notes taken &c. Not for the purpose of bringing off the goods as supposed, for they had been sold, but to obtain the co-operation of one in whom they could confide, and to bring the land into market. And although the requisition of the per centage may seem exceptionable, yet in truth all the ad-

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ministration services did not, as we apprehend, cost more than usual in Pennsylvania and in Kentucky.

Is it true that nothing was gained by this measure. On the contrary, we would not doubt that this administration, taking the usual course, and without the attendance and importunity of Lawson Moore, the sale of the land would have been deferred until its fall and then it would not have brought more than one half the sum, most probably not exceeding one third. This however is said to be speculative. We answer, that it is proved satisfactory; none conversant with the times can doubt, and the witnesses all, on both sides, affirm it. Moore, we acknowledge, did speculate rather badly. The guardians, although justified in so doing, would not venture to take the land at appraisement. Citizens would not then venture so much: but Moore, to close the concerns of the estate, and return to his family and domestic pursuits, incurred the hazard, and had the good fortune to indemnify himself.

We repeat that the land, but for the interference of Lawson Moore, would not have equalled the heirs to the amount of \$9000. Under his superintendence it amounted to near nineteen thousand. This advantage then was gained. More than one half the amount of the sales are imputable to the services of Lawson Moore. Should not the co-heirs then contribute to his indemnity, in the proportion which they are enriched by him. No, it is said, because he found his individual profit in it. To test the principle, suppose the share of Lawson Moore had been but one fifth, and relying upon the justice of the co-heirs with whom he could not consult, because of their absence from the country or their infancy, he had taken precisely the steps now proved; his disbursements then would have surpassed his interest, and surely the principle which would forbid contribution in the present, would apply equally in the case supposed. The amount involved can afford no criterion: but infants cannot promise, nor will the law create a promise under the circumstances, says the court—therefore, it cannot be allowed in equity. We would solicit further reflection upon this rule of

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equity. For we have understood that the want of redress at law, where justice required it, but the law would not imply an assumpsit, afforded a motive for the interposition of the chancellor. Thus joint securities, at one time, could only obtain contribution in chancery, because it was supposed the law implied no promise from the delinquent security, to him who paid the money. In the case of Shrieve and Grimes, it was decided that the law would imply no assumpsit on the part of Shrieve, the landlord or proprietor, for improvements made by Grimes, without a contract, and that Grimes could only recover in chancery, therefore he sued in chancery, and obtained his redress. Indeed we believe the cases are numerous where chancery has relieved because the law did not create a promise commensurate with the demands of justice; and we would submit it to this court, if there can be a difference, in equity, between the liability of adults and of infants in such cases. The redress is not the effect of contract, express or implied—it is the dictate of right and of justice. An infant may make no contract for the sale of his land; but he sells, and the purchaser improves. The contract is void, but the infant must pay for improvements. In no case of improvements made upon the land of an infant, has it been held that he was exempt from the rule, that one may not profit by the loss of another. Suppose five tenants of land, one an adult, the others infants; the adult discovers that the act of limitations is running and will cut off the redress; he, therefore, sues in the name of all the tenants; pays fees as for as a valuable estate; gains the possession, and upon bill subsequently filed for rents and profits, shall claim contribution for fees advanced to counsel &c. &c. We would believe it impossible that the chancellor would reply, that although the estate has been saved by the exertions of this joint tenant, that still as he was in part interested, he must bear all the burden of the litigation. If it be the rule, we would believe it is not the understanding and the usage of our country upon such subjects. On the contrary, we hope that it will be found that between all hold-
ing real or personal interests, as joint tenants, tenants

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in common and co-partners, infants or adults, contribution is due from the absent or inert, for all reasonable disbursements, in the improvement, preservation or recovery of the estate or right.

There can be no hardship in it, for the contribution is predicated upon a greater profit to the co-partner.

If we are correct in the principle applicable to the subject, doubtless much is due to Moore for services and disbursements; and we deem it at present unnecessary to enquire how much; this would alone be proper upon an argument.

If Moore might be expected to distrust the administrators and their counsel, he surely was justifiable in engaging the Duncans, and should, therefore, pay them something, and how much that shall be, may likewise with greater propriety be discussed upon hearing.

Touching the charge for the removal of the family, we will only say that the Pennsylvania guardian made the advance for that purpose, and approved the measure. It was not entirely officious on the part of Moore, and we yet think, if Moore is to be compensated, the preponderance of proof is with him in amount. Indeed we would suppose that this charge for expenses &c. incurred with the privity and funds of the lawful guardian, would have been sanctioned by this court, but for the testimony of the witness, Barnett. Moore was certainly influenced by affection for his brother's children, in leaving his home and domestic duties and attending them to Kentucky. We do not think he would have undertaken it for strangers; yet we do not apprehend, that, therefore, it would have been said by this court, that he must again account for the money he received from the Pennsylvania guardian, who has all the powers of a rational father of the child, and expended in pursuance of the expectations and design of that guardian, had not a Mr. Barnett deposed that it was to cost nothing. That witness, however, was incorrect, for in his second deposition he distinctly denies it. This deposition in so

great a record has escaped the vigilance of this court; but we repeat, that it may be found in page 19, and the circumstances and proof are, therefore, on this subject in favor of the claim.

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Say, however, that the Pennsylvania guardian abused his trust; that he improperly handed this money to Moore, and authorized its application to purposes beyond the pale of his authority, and that although Moore did so apply it, he and not the guardian is answerable to the heirs a second time, still the widow would seem to us to be chargeable, and that an implied assumpsit would lie against her for all that she received, not that we would cancel gifts and bounties, but because no present was made.

As to the charge of the same item a second time, we cannot discover it, and our client says the opinion is predicated upon a mistake.

A re-hearing is respectfully requested.

The Court overruled the motion for a re-hearing—The CHIEF JUSTICE said—

THE bar is the nursery from which the bench is supplied. The bench has an influence in the proper cultivation and training of the bar. They have mutual action and re-action. To imprint the administration of the laws upon the public confidence, and to maintain it through successive generations, an elevation of character in the bench, and a pride of character in the bar, are important in the highest degree. This elevation and pride of character, the judge and the counsellor should mutually respect and cultivate. Not the one, nor the other should wantonly assail. These truths should ever be remembered. Their application to the petition will not be misunderstood, the commentary need not be expressed.

Decorum between the bench and bar.

The rule of practice established and prevailing in this court, at the time of the argument of these cases, applicable to the argument of cross appeals and writs of error, required, that the counsel for the plaintiff below should open the argument upon the errors on his part assigned; that the counsel for the defendant below should, next in order, be heard in answer to that assignment, and should open the ar-

Rules of practice in this court, in the argument of cross appeals.

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gument of the errors assigned on his part; that the counsel for the plaintiff below, should next be heard in maintaining his assignment, and in answer to the errors assigned by the defendant; lastly, that the counsel of the defendant be heard in maintaining his own assignment of errors. Under this rule the counsel for the defendant, Moore, was in the attitude of concluding the argument, and when bound by the rule to confine his reply to the maintaining of the assignment of errors on his part, he was, in the opinion of the court, travelling out of his own assignment into the assignments of his adversaries; for this cause he was stopped by the court, and required to conform to the rule. The rule of practice, and the requisition upon the counsel to confine his argument within its limits, were explained at the time. He was stopped only for the purpose of explaining the rule, and requiring his compliance with it.

The counsel in his petition, by stating his opinion and inference from the facts, instead of stating the whole of the facts, has given a coloring, which distorts the act of the court. That rule was complicated and difficult of execution, and therefore, the court have, by a written rule, declared that cross appeals and writs of error shall be heard as one cause; the counsel for the plaintiff below to open the argument; the counsel for the defendant to be heard next in order, and the counsel for the plaintiff to conclude.

If there be an asperity in the opinion formerly delivered, it is the asperity of truth and fair inference from the facts disclosed by the record.

First opinion
adhered to.

This court finds no cause for opening their decree, nor for changing their former opinion.

The petition is overruled.

Crittenden, for Chapline and Moore's heirs; Haggis, Mayes and Daviess, for Lawson Moore.

Yeizer vs. Stone's heirs.

COVENANT.

Error to the Rockcastle Circuit; JOSEPH EVE, Judge.

Case 26.

Infants. Costs. Prochain ami.

Chief Justice BIRB delivered the Opinion of the Court.

April 26.

It seems to this court, that Yeizer was a mere trustee, without any beneficial interest, the friendly agent accepting the deed of trust from Rodham Kenner, for the slaves therein mentioned, for the purpose of executing the uses and trusts in favor of said plaintiffs, "to the best of his discretion," The plea of Yeizer, that said slaves were not the property of the grantor at the date of said deed, but had been previously sold by said Rodham to Lawrence Kenner; that said Rodham had procured the slaves to be run off beyond the limits of this Commonwealth, without the knowledge or consent of Yeizer, and that they had come to the possession of said Lawrence, who held them from Yeizer by a superior title, was a good defence to the action, and ought to have been received under the circumstances stated in the affidavit, although offered after issue joined upon other pleas. It is, therefore, considered by the court, that the judgment of the circuit court be reversed, and that the cause be remanded for such farther proceedings, as may comport with the opinion of this court herein expressed.

It seems that where an infant suing by his *prochain ami*, recovers below, and the defendant prosecutes here, and the judgment is reversed, the judgment for costs here, shall be against the *prochain ami*, and not the infant.

And it is further considered, that the plaintiff recover of the defendants his costs in this court, and in this behalf expended; and it is ordered that Samuel Stone, who prosecuted this suit, as next friend and guardian of said infant plaintiffs below, pay the cost adjudged against the said infants in this court.

The Chief Justice, however, does not admit the plaintiffs ought to be permitted to sustain an action at law upon the covenant of Yeizer, nor does he admit the sufficiency of the averments to show a breach of the trust as undertaken by Yeizer.

Crittenden and Green, for plaintiff; *Robertson*, for defendant.

CHANCERY.

Triplett and Turner vs. Cox.

Case 27. Error to the Montgomery Circuit; SHAS W. ROBBINS, Judge.

Sett off in Equity. Usury. Assignments.

April 26. Chief Justice BIRB delivered the Opinion of the Court.

Case formerly here—See 3 Mon. 303.

TURNER exhibited his bill against Cox alone to set off two notes, which Cox held on Turner, against a judgment recovered by Turner to the use of Triplett against Cox. That case was brought to this court; the decree in favor of Cox vs. Turner was reversed on the 26th of May 1824, and the cause remanded, with directions that Triplett be made a party because of his apparent interest. That case is reported in 5th Litt. p. 175.

Cox's amended bill.

When the case returned, Cox amended his bill and made Triplett a party. In this bill he alleges that the notes alluded to in his former bill were given by Turner to Wells for money lent by Wells to Turner; that Triplett, to defraud the creditors of Turner, caused the action at law to be prosecuted against Cox for the use of Triplett; that he does not believe that Triplett had any assignment of the store accounts on which the action at law was founded, nor that the use so expressed in favor of Triplett was founded on any consideration good and valuable in law.

The suit to the use of Triplett, was instituted against Cox on the 15th May, 1820; judgment rendered on the 15th March, 1821.

The notes set up by Cox were executed by Turner and McGowan and Stockdon to John Wells, the one for \$140, specie, and \$60, in Kentucky notes, bearing date 12th December, 1818, the other for \$53, bearing date December 30th, 1818, the assignments bearing date on the 16th May, 1820.

Triplett's answer.

Triplett, by his answer, denies that Cox paid any consideration for the assignment to him—charges, that those notes were usurious and void, and founded on a corrupt agreement for more than the legal rate of interest; that said notes were paid off to Wells by Stockdon or McGowan, the obligors, and

by a combination between Stockdon and Cox, the assignment was made to Cox, for the purpose of endeavouring to defeat Triplett of his claim by assignment, of which they Cox and Stockdon had notice; he denies any notice that Turner or McGowan or Stockdon were indebted to Wells when he received the assignment from Turner of the demand on Cox—he alleges it was made for a valuable consideration, upon a sale and exchange of property &c. between himself and Turner.

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vs.
COX.

Cox, by way of replication, charges the assignments of the bonds, notes and accounts, in said agreements mentioned were the consideration, for the sale of a clerkship by Triplett to Turner, and that the exchange of houses and lots was colourable only—and various exceptions were taken to Triplett's answer to interrogatories put to him in this replication.

Cox's replication.

Before the suit brought by Turner, to the use of Triplett, Turner had given an order to Triplett on Cox, of the 31st December, 1819, for \$300, by virtue of this order, arising out of the negotiations between Turner and Triplett, the suit was brought against Cox to the use of Triplett, and the judgment obtained for \$288 50 damages.

The circuit court decreed that the assigned notes set up by the bill should be set off against the judgment at law—from which the defendants appealed.

One for whose use an action is prosecuted, is a necessary party to a bill by defendant, for a set off against the judgment, and may shew his assignment prior to complainant's demand, or repel complainant, for the usurious consideration of his claim, before the consideration of his assignment can be enquired into.

It seems to this court, that the assignments of the notes, in the bill mentioned, were procured by Cox subsequently to Triplett's assignment of the demand on which the judgment was founded, and that Cox paid nothing for those assigned notes, and that they were paid and taken up by Stockdon, one of the obligors, and that the said notes were void because founded on a corrupt and usurious loan by Wells of money, at a rate of interest greatly exceeding six per cent, so that the complainant has no foundation for impeaching the assignment to Triplett and none for relief against the judgment at law. It is, therefore, ordered and decreed that the said decree of the circuit court be reversed, and that the case

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be remanded, with directions to dissolve the injunction, with damages, and dismiss the bill with costs.

Appellants to be paid their costs in this court.

Trimble, for plaintiffs; *Jas. Trimble*, for defendant.

CHANCERY.

McDaniel's Adm'r. vs. Donaldson.

Case, 23.

Error to the Warren circuit; HENRY P. BRODNAX, Judge.

Statutes. Judgment creditors. Trustees. Choses in action.

April 26.

Judge OWSLEY delivered the Opinion of the Court.

Judgments at law.

DONALDSON sued Gatewood on three notes, each for \$899 13 cents, recovered judgment for the amount of each note, with interest and costs, and caused executions to issue thereon against the estate of Gatewood, upon each of which the sheriff returned no property found.

Bill by judgment creditor to subject a debt due defendant, under the act of 1821.

A bill in equity was then filed by Donaldson, under the act of the Legislature of this country, to subject to the satisfaction of his judgments, a debt of about \$1500, which he alleges is due from Slaughter, by a bond given to Gatewood, and by Gatewood assigned to McDaniel in his lifetime, but which assignment he charges was made in trust for the use of Gatewood, after a debt of about \$115, owing by Gatewood to McDaniel, was satisfied. The administrators of McDaniel, Gatewood and Slaughter were all made defendants to the bill, and such relief prayed as might comport with the justice and equity of the case.

Answer of the administrators of McDaniel.

The execution of the bond by Slaughter to Gatewood, and the assignment thereof by Gatewood to the intestate is admitted by the administrators, but they deny that the assignment was made to their intestate. Gatewood was owing him the sum of about \$115, as charged in the bill, but they allege that, the assignment was made not only to secure the intestate in the payment of that debt, but also to secure the payment of about six hundred dollars and interest, and which was at the same time

owing by Gatewood to Benjamin Sherley, and for which Sherley held Gatewood's note. This debt of Gatewood to Sherley, amounting with the interest to \$624, the administrators charge, has been paid out of Slaughter's bond, and they claim a right to be indemnified for that payment, and also to be paid the \$115 which Gatewood was owing the intestate, McDaniel, out of the debt owing by Slaughter, and for which they admit they hold the bond of Slaughter, which was assigned to their intestate by Gatewood.

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Slaughter admits the execution of the bond to Gatewood, and the assignment thereof by Gatewood to the intestate; but he alleges that Bell, with whom he contracted for that purpose, has, by an arrangement with Gatewood, either discharged, or become liable to discharge, the amount of the bond.

Donaldson's
answer.

Bell was also made party and brought before the court. He states that he has paid \$624, part of the debt which was owing by Slaughter, and admits his liability to pay the residue.

Bell's answer.

Gatewood is out of the State, and on publication, the bill was taken for confessed against him.

The court was of opinion that the bond on Slaughter, was assigned to the intestate by Gatewood, not for the purpose of securing to Sherley the payment of his debt of \$620, but exclusively as a security to the intestate for the \$115, which Gatewood was owing him, and decreed that the administrators of McDaniel, should pay to the complainant, Donaldson, out of the assets of the intestate, \$493 48, that being the amount of money paid by Bell in part satisfaction of Slaughter's bond, after deducting the \$115 which was owing their intestate by Gatewood. The court also decreed that Bell should pay the complainant, the residue of the debt due under Slaughter's bond, and acknowledged to be payable by Bell, after crediting the sum of \$624 paid by Bell. To reverse that decree, the administrators of McDaniel have prosecuted this writ of error.

Decree of the
circuit court.

The amount of money which Bell paid, was not received from him by the administrators, but it was

Question
stated.

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McDANIEL'S
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paid to Sherley in satisfaction of his debt on Gatewood, and the amount credited by the administrators, on Slaughter's bond; the administrators at the same time, taking up the note of Gatewood to Sherley, and accepting a receipt from Sherley, in which he acknowledges payment of the amount of his note. The only question for consideration is, whether under these circumstances, the administrators are chargeable in the present contest for the money which was so paid by Bell to Sherley, and afterwards credited by them upon Slaughter's bond. If they are chargeable, the decree against them is right, if not chargeable, the decree is wrong.

Where one to whom an obligation is assigned in trust for the payment of a smaller sum, agrees with the obligor he may pay another debt of assignor, and be credited for the amount, and it is done, the assignee cannot be subjected by a judgment creditor of the assignee by bill under the act of '21, but the transaction is valid.

The propriety of making the administrators liable to the complainant, Donaldson, for any part of the money paid by Bell to Sherley, though credited by them on the bond of Slaughter, would be difficult to maintain, were it even conceded that the bond was not assigned to the intestate, McDaniel, by Gatewood, in trust, to secure the payment of Sherley's debt; for in moral justice, the debt of Sherley against Gatewood, is not in any respect, inferior to the demands set up by the complainant, in his bill. So that after recognizing the payment of Sherley's debt by Bell, taking in his note and crediting the amount thereof on the bond of Slaughter, the administrators must be understood to have as high claims upon the justice and conscience of the court, to be indemnified for the sum paid Sherley, as the complainant can possibly have for the demands set up in their bill. Possessing, therefore, equal equity with the complainant, the administrators it would seem, cannot be deprived of their legal advantage derived under the assignment of Slaughter's bond to their intestate, and compelled to repay the sum credited on that bond to the complainant, without doing violence to one of the most firmly established rules by which courts of equity are guided in their decrees.

Question of
fact decided.

But it is not upon this principle only, that the administrators have rested their defence. They allege that the bond of Slaughter was assigned to their intestate, for the purpose of securing the payment of Sherley's debt; and they insist, that in suffering

Bell to pay that debt, and in crediting the amount thereof on Slaughter's bond, they have done nothing more than fulfil one object of the trust reposed in the intestate, by the assignment of Gatewood. To ascertain the correctness of the position thus assumed by the administrators, we have looked into the evidence contained in the record, and though it is admitted, that there is not an entire correspondence between all the depositions, we have no hesitation in saying, that the weight of the evidence is decidedly with the allegations contained in the answer of the administrators, and satisfactorily proves that Sherley's debt was to be satisfied out of the bond of Slaughter, which was assigned by Gatewood to the intestate.

McDANIEL'S
adm'r.
vs.
DONALDSON.

It follows, that the decree is not only erroneous, so far as it subjects the administrators to the payment of any part of the money paid by Bell to Sherley; but moreover, it is erroneous in decreeing the residue of the debt due under Slaughter's bond, to be paid to the complainant by Bell, without deducting therefrom, a sufficient sum to satisfy the debt of \$115, and interest, which Gatewood was owing the intestate, and to secure the payment of which, was one object of Gatewood in making the assignment of Slaughter's bond.

Decree and
mandate.

The decree must, therefore, be reversed with cost, the cause remanded to the court below, and a decree there entered in conformity with the principles of this opinion.

Crittenden, for plaintiff; *Mayes*, for defendants.

Sproule &c. vs. Winant's heirs.

Error to the Madison circuit; **GEORGE SHANNON**, Judge.

CHANCERY.

Case 29.

Conveyance bond. Assignor and Assignee. Consideration. Conveyances. Specific performance. Practice. Decrees. Costs.

Judge **OWSEN** delivered the Opinion of the Court.

April 28.

ABSALOM BRIDGES gave his bond or covenant without penalty, to convey a tract of land to **William Miller** and **Ralph Lilburn**.

Case stated of a bill for specific per-

**SPROULE &c.
vs.
WINANT's he**

**formance of a
contract for
land.**

Lilburn assigned this bond, or his interest therein, to his co-obligee, Miller; Miller assigned the whole bond to Oliver Sproule.

Sproule gave his bond to convey the same land to the heirs of John Winant, naming each heir, and bound himself to make the title, so soon as he could get a title to the land from Absalom Bridges.

The heirs of Winant filed their bill to compel a conveyance, and charge the title to be in Bridges; and that Sproule never took any steps to get it from Bridges, for the purpose of fulfilling his contract with them. Sproule answered, insisting that he has not forfeited his bond, because he never could get a title from Bridges, on which event he was to convey.

**Decree for a
conveyance.**

The court below decreed in favor of the complainants, and various exceptions are taken to the decree by the assignment of error.

**In the assign-
ment of bond
for land, it is
understood
the assignee,
immediate or
remote, shall
take a con-
veyance from
the obligor,
expressing
the consider-
ation the ob-
ligor received
and not what
the assignee
paid.**

It does not appear what consideration passed from Miller and Lilburn to Bridges, for the land. The bond imports a valuable consideration, but how much is not manifest from the bond, or any part of the record. The consideration which passed from the complainants to Sproule, does appear.

**Decree for a
conveyance
in favor of an
obligee whose
obligor held
the bond of
the holder of
the title by
assignment.**

The court decreed that both Bridges and Sproule should unite in a joint conveyance of the land—the deed expressing the consideration which passed between the complainants and Sproule. This is incorrect. For the consideration for which Bridges ought to be bound, may be far less than that between the complainants and Sproule; and as the complainants have not shewn it to be as great, and have contented themselves without ascertaining what it is, it follows that Bridges ought to be directed to convey to Sproule by deed, with general warranty, reciting the sale bond which he had made, and the bond which he had given as the consideration, leaving the precise sum open and subject to inquiry, if at any time hereafter, Bridges shall become liable to an action on the warranty. This warranty, it is true, after the conveyance of Sproule to the complainants, will belong to them; and in case of eviction, they may sue on it as assignees thereof, instead of bring-

ing their action against Sproule on his warranty. But in said action the value of the land as fixed by the consideration between Bridges and Lilburn and Miller, will be the proper criterion of damages, and not that fixed between Sproule and the complainants. While the bond of Bridges was in market, and passed from assignor to assignee, each assignee must be understood to have agreed to take a conveyance according to the consideration passing from obligee to obligor, instead of that passing from assignee to assignor. It follows, therefore, that Bridges ought to be compelled to convey to Sproule, according to the consideration which he has received; and Sproule to the complainants, according to the consideration given to him; and it was erroneous to direct a joint conveyance.

It may also be remarked, that the conveyance to some of the female complainants, has been directed to be made to their husbands, when the bond was to them alone. The conveyance ought to be directed to the wife only, leaving the husband to take his right under the marriage.

The court, instead of decreeing that the parties should convey by a final decree, and then afterwards on their failure, appointing a commissioner, if applied for, by a decretal order, has fallen into a common error, of which we have had often to complain. The decree was made interlocutory, and directed the defendants to convey by a certain day, and if they failed, a commissioner should convey, leaving with the commissioner, the right to judge of the failure. The court then retained the cause till the commissioner ascertained the failure, and reported the conveyance, which the court approved, and then made a final decree settling the costs.

Sproule complains that he was charged with costs, when Bridges never conveyed to him, and he was only bound to convey when Bridges conveyed. We do not see how to release him from costs. He was bound to convey so soon as he could get a title from Bridges. He has not shewn that he attempted to get one, or that there was any obstacle to his getting one, if he had tried it.

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vs.
WINANT's he

When the bond for land is to the wife, the decree ought to direct the conveyance accordingly, and not to the husband.

In a decree for specific performance the chancery ought at once to render a final decree for a conveyance, and afterwards if not complied with, appoint a commissioner by decretal order, and so have the decree executed.

One who covenants to convey when he gets the title from another, must use the proper means to obtain it.

SPROULE & C. Decree reversed with costs, and cause remanded
VS. for such decree, and proceedings to be had as shall
WINANT'S HE conform to this opinion.

Costs. Turner, for plaintiff; Caperton, for defendant.

CHANCERY.

Payne vs. Cabell.

Case 30. Appeal from the Todd circuit; HENRY P. BROADFAX, Judge.
Vendor and Vendee. Rescission of contracts. Equity.
Deeds. Onus probandi.

April 28. Chief Justice BISE, delivered the Opinion of the Court.
Statement. ON the 10th of October, 1818, Cabell sold and conveyed to Payne, by deed of general warranty, three hundred and eighty-one acres of land, lying in the county of Christian, on Little river, in consideration of six thousand eight hundred and fifty-eight dollars—being at the price of eighteen dollars per acre, and delivered possession.

In June, 1822, Payne exhibited his bill, and obtained an injunction against a judgment at law for about \$1,200, besides interest and costs, the balance due on a bond given for the last payment of about \$1,600.

Grounds of Payne's complaint. The grounds of complaint in this bill are, that Cabell has removed to Missouri, and is insolvent; that he has discovered that the claims sold to him are conflicted with by Joseph Williams', to the extent of about five acres; also, by one of James C. Cravens, of forty-two acres; and that to the tract of 67 acres, part of the 381, so sold, the vendor derived his title by purchase under the patent of Nicholas Hawkins; that Jane and Joseph Hawkins had conveyed, being the widow and son of the patentee, but that Jesse and Enoch Hawkins, two of the heirs of the patentee, had not conveyed—they being infants. To this bill Payne, Williams and Cravens, are made parties, and the claims of Williams and Cravens, are alleged to be superior to that of Cabell, and the defendants are required to litigate and settle these questions. By an amended bill, the complainant suggested, that Thomas Hays held a conflicting claim of

PAYNE
vs.
CABELL.

14 1-2 acres; and that Calvin Boals held a conflicting claim of 9 1-2 acres, and their claims are alleged to be superior to that of Cabell, so sold and conveyed; and they are made defendants to litigate and settle those questions. The complainant in part of the purchase, had assigned to Cabell, a replevin bond on William F. Tegarden and sureties, for \$2,624. Tegarden had enjoined that debt for alleged defect in the title to the land which he had purchased; and Payne, alleging he expected to dissolve Tegarden's injunction, obtained an injunction against Cabell, to restrain him from collecting the amount of Tegarden, by virtue of Payne's assignment.

The complainant also charges that two of Cabell's surveys conflict with each other, five acres; that is to say, Hatfield's of 80 acres, and Robert Harrison's of 42 acres; that by consequence, the quantity sold is lessened by five acres. He farther alleges, Hatfield's survey, instead of 80 acres, holds out more than 100 acres; but he cannot find any conveyance from Hatfield to Hawkins, of whom Cabell bought this; that these interferences and defects of title, had spoiled the tract, and he prays the contract to be rescinded.

Cabell, by his answer, denies his insolvency, and every matter of complaint alleged, except the infancy of Jesse and Enoch Hawkins, at the date of his conveyance to Payne; but of that defect he alleges that Payne was informed, and agreed to risk the acquisition of the title from them at full age, according to a bond their friends had given, covenanting, that they should convey. But to obviate that, he produces their deed after their full age, dated 5th Dec. 1822, duly acknowledged, and recorded in Christian, on the 28th December, 1822; the youngest having, according to the proof, arrived at full age in May preceding. He also produces another deed from himself to Payne, duly acknowledged and recorded in Christian county, of the 6th April, 1823.

Cabell's answer, removing the objections to the title.

The defendant Boals, by his answer, denies that his small interference was ever intended to be asserted by him as the superior claim; and he disclaims all title and claim under it.

Boals' disclaimer.

PAYNE
vs.
CABELL.

Answers.

Injunctions
dissolved,
without dam-
ages.

Objections to
Cabell's title
alleged by
Payne, found
to be ground-
less.

Alleged defi-
ciency in
quantity
found with-
out founda-
tion.

*The other defendants, Cravens, Williams and Hays, answer, and allege their entries by virtue of head-right certificates, to be superior to the claim of Cabell, so sold to Payne.

The court dissolved the injunctions, but gave no damages, and dismissed the bill with costs, and Payne appealed.

The interferences of the adversary conflicting claims, alleged by the bill, are not traced to any foundation which can create a probability, or even a suspicion, that they can disturb the claim and possession so sold and transferred by Cabell to Payne. The adversary claimants themselves, with Payne to assist them, have not produced any adversary rights, which in law or in equity, wear a semblance of validity and superiority over those of Cabell. Grants, or copies of grants from the land office, or other documents upon which rights and interests to lands are adjudicated, are not produced in evidence, so as to enable this court to pronounce such asserted adversary claims conflicting with those sold to Payne, to be valid in law or in equity. The deficiency of documentary evidence, and of other testimony to sustain these asserted adversary rights, is so great, as that the title of Cabell, which Payne has acknowledged, by accepting the deed and possession, cannot be said to have been thrown under a suspicion, to be inferior to those of Williams, Cravens and Hays.

The defect for want of conveyances from Jesse and Enoch Hawkins, has been obviated by their conveyances after they attained their ages of maturity.

The complainant argumentatively asserts, that because the survey of Robert Harrison, of 42 acres, and the part of the claim of Hatfield, as conveyed to him by Cabell, clash with each other to the extent of five acres; that, therefore, there is a deficiency of quantity thence arising, and claims an allowance for the deficiency of that five acres. In one breath he alleges this conflict to the extent of five acres between Harrison and Hatfield's surveys, the one for 42 acres, the other for 80 acres; and thus argues

and claims, as for a diminution of five acres in the quantity sold; and immediately, *in eadem statu*, he asserts a large surplus in Hatfield's survey, to magnify the injury he has sustained by defect of title, and the conflict of James C. Cravens' claim with the surveys of Harrison and Hatfield. But the error of the argumentative deficiency thus attempted to be imposed upon the court, is detected by inspection of the deed to Payne, and the abutments of the several parcels, and their respective quantities as reported by the surveyor, as shewn by the complainant. The deed describes four several parcels by their abutments. The quantity of but one parcel is given in the deed; that is of the extreme northern parcel which binds on the lines of Hatfield and Harrison; it is a part of Jeremiah Cravens' 300 acres, and part of Robert Cravens' 150; and this parcel is called fifty-five acres in the deed, which with the boundaries of the other three parcels, are stated to contain three hundred and eighty one acres—the quantity sold, and to be paid for. Now, the four parcels so conveyed, are thus reported by the surveyor: the original survey of 230 acres for the Franklin academy; this is the southern boundary. The northern parcel of fifty-five acres; Robert Harrison's survey of forty-two acres, and the parcel, part of Margaret Gray's and Hatfield's surveys, sixty-seven acres; these, if there had been no lapping between the interior abutments, would have contained three hundred and ninety-four acres, instead of three hundred and eighty one. Therefore, the complainant could not make a direct and positive allegation, that the exterior lines did not include three hundred and eighty-one acres, nor call upon the surveyor to report whether there was a deficiency or a surplus, but claimed a deficiency as to five acres, by way of inference and deduction, from part of the facts. There is no evidence that the quantity conveyed falls short of the quantity sold and calculated at eighteen dollars per acre.

The insolvency of Cabell is denied, not proved, but repelled by the evidence. His removal to Missouri was contemplated at the time of the contract, and known to the complainant.

2 A

PAYNE
VS.
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CABELL.

Vendee who accepted the title is presumed to have inspected the title and received the deeds; and therefore, to resist the payment of the price, must prove the defect of the title, besides shewing he has no remedy at law.

Decree of affirmance.

The vendee has accepted the deed, he has received possession, he has enjoyed it without disturbance; he alone has stirred up adversary claims, and when so stirred, neither himself nor the alleged claimants, have been able to make good their claims. A vendee will not be compelled to accept a conveyance under an executory contract, until the vendor exhibits a regularly deduced title, free from incumbrance, and apparently sufficient to assure the estate according to the contract. But a vendee who has accepted a deed, and the possession, with a covenant of warranty, is presumed to have inspected the derivations of title, and to have been satisfied with assurances; and to have received the title papers. After such acceptance of the possession, and deed, and covenant of warranty, a vendee, before eviction or disturbance, cannot receive the aid of a court of equity, to assist him to withhold the purchase money, or rescind the contract, but by taking on himself the burden of showing a defect in the title of the vendor, of a latent character, and of proving superior, outstanding, subsisting adversary rights and interests. This task the complainant did undertake, but has wholly failed of the performance.

It seems to this court, that the complainant has made out no case which requires the interposition of a court of equity, to relieve him from the payment of his purchase, or to rescind the contract; but that he should be left to seek his redress upon the covenant of warranty, in case of eviction, if such event shall ever happen; of which, however, the complainant has not shewn any probability. There is no error in the decree, to the prejudice of the appellant. It is, therefore, ordered and decreed, that the said decree of the circuit court be affirmed.

Appellee to be paid his costs.

Triplett, for appellant; *Mayer*, for appellee.

Head's rep's. vs. McDonald.

ASSUMPSIT.

Error to the Washington circuit; WM. L. KELLY, Judge.

Case 31.

Evidence. Sheriff's sales. Principal and Surety.

Chief Justice BIBE, delivered the Opinion of the Court.

April 28.

MUDD made his note for \$1,095, negotiable at the Bank of Kentucky, payable to Bigger, J. Head, who endorsed it to McDonald, who endorsed it to the President, Directors and Company of the Bank of Kentucky. This note, so endorsed, and unpaid when due, was put in suit by the said President, Directors and Company, against the last endorser, McDonald, and the money was collected by their judgment and execution. Upon this, McDonald founds his action against the representatives of the said previous endorser, Bigger I. Head, (now deceased) to recover the amount of said judgment and execution.

Case stated.

The action was tried on the issue of non assumpsit, with leave to give the special matter in evidence.

Issue.

To support this issue on his part, the plaintiff and endorser, McDonald, gave in evidence the note so as aforesaid endorsed; and to prove the manner of satisfaction made to the bank, and to raise an implied assumpsit to himself, (as last endorser and taker up of the note) from the previous endorser: (Bigger I. Head,) introduced the judgment, execution and sheriff's return, in the case of the bank against him (McDonald.) By this it appears that the sheriff levied upon a slave, named Jim, with other property, which being sold, slave Jim was purchased (at sheriff's sale, under said execution,) and paid for by Bigger I. Head, at the price of \$501; and by this, with the sale of the other property specified in the sheriff's return, that execution against McDonald was satisfied. As the price of Jim is the only question of controversy presented by the bill of exceptions, the other credits insisted on, and allowed by the jury, to the intestate, need not be noticed, as they are unconnected with the points made, and reserved by the exceptions taken.

Plaintiff's evidence.

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M'DONALD.

Defendant's
evidence.

The defendants proved, that before the judgment, execution and sale aforesaid, McDonald had sold the said slave Jim, to John Slack, and had received payment; that Bigger I. Head had sold the slave to Edward L. Head, and proved by the record, that Slack had instituted his action of trover against said Edward L. Head, and had recovered the value of said Jim. The record of the action of trover for Jim, was offered and read by the defendants below, to prove the bare fact of such recovery by Slack.

Instruction
moved by de-
fendants, re-
fused.

Upon this evidence, the defendants moved the court to instruct the jury, that if they found, that said McDonald, before the emanation of the said execution, in favor of the bank, against McDonald, made a *bona fide* sale of said slave Jim, to Slack, and that he was at the time of said sale and purchase, by Bigger I. Head, the property of said Slack, that then they ought to credit said Bigger I. Head with the amount of the price of Jim, paid as aforesaid by said Head, for his purchase under, and by virtue of said sheriff's sale; this instruction the court refused to give.

Evidence ex-
cluded on
motion of
plaintiff.

The plaintiff, McDonald, then moved to exclude the record of the recovery by Slack against Edward L. Head, altogether. This was done, and the jury were instructed that said record was in nowise evidence in this suit, as McDonald was not a party.

Instruction
on plaintiff's
motion.

This record being excluded, the plaintiff, McDonald, moved the court to instruct the jury, that they ought not to give a credit to Bigger I. Head's administrators, for the price of Jim, so paid by the intestate upon said execution, against McDonald in favor of the bank, nor for any part. This instruction was accordingly given.

In an action
by principal
against sure-
ty for money
made by sale
of the goods
of the surety

To these opinions the executors and heirs of Head excepted; and these are the only subjects for reversal.

McDonald counted specially upon the judgment against him, and the compulsion to pay; stated that note, judgment, and compulsion on him to pay, as the foundation of the *assumpsit*, and produced the

judgment and execution, and return, to sustain the assumption, as one implied and created by law. McDonald himself, traced the manner and particular items, by which he paid the execution, judgment, and note, for which he claims remuneration from the representatives of Bigger I. Head. His own evidence shews, that the price of Jim, sold under that execution, did discharge five hundred and one dollars thereof; and that said Head paid that sum for Jim to the sheriff, for, and on account of that judgment and execution. Now suppose the facts be true, that Jim was not the property of McDonald, at the times of the judgment, execution, levy and sale; that McDonald had before, sold and received payment for Jim, and that he was the property of Slack; then it is clear that Bigger I. Head, acquired no property in Jim, by virtue of his purchase at the sheriff's sale. Suppose that Bigger I. Head sold to Edward L. Head, and that Slack, the right owner of Jim, has made his election to sue Edward L. Head, in trover, for Jim, and has recovered his value. Then it is clear, that Edward L. Head had a right to look to his vendor, Bigger I. Head, for recompense. And Bigger I. Head, having so bought and paid his money for Jim, without having acquired any title, has a right to his recompense from some quarter. Can McDonald insist upon the sale of Jim to be applied to his credit on the execution, if Jim was the property of Slack, and yet deny to Bigger I. Head, a credit for the sum which he has so paid for Jim, to the use of McDonald? Will the law imply a promise from Bigger I. Head, to pay for Jim a second time, to McDonald, when neither McDonald had title to Jim, nor Bigger I. Head either, his former payment to the sheriff notwithstanding? Can McDonald *ex aquo et bono*, receive payment from Slack, and a credit on the execution also, for Jim, and now demand his price a third time from Bigger I. Head's administrators? Edward L. Head cannot recover for Jim, in a suit against the sheriff, nor against McDonald, nor against the bank; there is no privy of contract between Edward L. Head, and any of those. He must look to Bigger I. Head, the vendor. Slack had his election to sue the sher-

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M'DONALD.

under execution, purchased by defendant, it may be shewn by defendant that plaintiff had before sold the goods to another, who afterwards recovered of defendant's vendee.

One who purchases goods at sheriff's sale, and sells to another, from whom they are recovered by paramount title, becomes immediately entitled to his recovery, before satisfying his vendee: because his responsibility is fixed.

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vs.
McDONALD.

iff, or Bigger I. Head, or Edward L. Head. He has made that election. By that election, the right of Edward L. Head, to recourse upon his vendor, was fixed. Edward L. Head has recourse to none but his vendor, upon the implied warranty of title. Bigger I. Head, being thus fixed in his responsibility to Edward L. Head, is entitled to have his recourse. That does not depend upon actual satisfaction made to Edward L. Head, his vendee; but arises out of his fixed responsibility to said Edward. Bigger was not bound to wait an actual recovery by Edward; nor until an actual satisfaction.

Purchasers
may recover
of the Sheriff
in such case.

Bigger I. Head, had his recourse against the sheriff, it is true; but *ex æquo et bono*, in conscience, and in good faith, McDonald himself, is the last and ultimate resource from whom the remuneration is to come, for the price of Jim, which has been applied to pay the debt due from him upon the judgment and execution. By insisting on the benefit of that sale of Jim, and appropriating the proceeds to his use, and founding his claim thereon, against the endorser, Bigger I. Head, McDonald has confessed, and declared, and assented, that the money so laid out, advanced, and paid to the sheriff, by Bigger I. Head, for Jim, was money laid out and advanced to his use and benefit. By his own evidence, he claimed the benefit of the sale made to Bigger I. Head; and taking the evidence which the defendant offered, into the connexion, and supposing the facts to be true, which that evidence conduced to prove, the plaintiff had no right to recover of Bigger I. Head's representatives, the amount of Jim's price at sheriff's sale, so paid and laid out to the use of McDonald. Those facts, upon the motion of the court, are taken hypothetically, as if found true by the jury; the motion for instruction is so, and if so found by the jury, the defendants had a clear right, in justice and equity, to a credit against McDonald, for the sum for which the sheriff sold Jim, to Bigger I. Head.

Judgment
between others
evidence

The evidence of the recovery by Slack, against Edward L. Head, was very proper evidence to the single fact, that such recovery was had; because it shewed the election by Slack, to take his recourse

against one of several persons, who were responsible to him. That election concluded him, and determined the order of recourse among the other persons concerned. It was not evidence of the want of title in McDonald: that question was to be decided by the jury, upon the other evidence offered. A recovery in ejectment against an alienee in the most remote degree, or against the tenant under him, is evidence against the first warrantor, to prove the fact, that such eviction had been, but not that it was by title paramount; that must be made out by evidence *aliunde*. See *Booker's adm'rs. v. Bell's ex'rs.* 3 Bibb, 174. *Devour v. Johnson*, 3 Bibb, 410. *Cox v. Strode*, 4 Bibb, 4. *Gaither v. Brooks*, 1 Marshall, 440. The rule of evidence as adjudged in those cases, is in principle, applicable to all cases of records between others, where, upon the fact of such trial and recovery, the interests of others hang as incidents or consequences. And this seems to have been the view taken, in the cases of *Lewis v. Knox*, 2 Bibb, 454, and *Barr v. Gratz*, 4 Wheat. 213, 220. That such suit was brought, and such recovery had, are facts, and to be proved by the record which was offered. The consequences to others, resulting from those facts, apparent from the face of the record, are to be established by appropriate evidence of such other facts as may be necessary to sustain the action or defence.

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vs.
M'DONALD.

of the fact of
its having
been rendered,
and competent
when that fact is
material.

It seems to this court, that the circuit court erred in ruling each and every point, as stated in the bill of exceptions taken by the defendants in that court. It is, therefore, considered by this court, that the judgment of the circuit court be reversed, and the verdict set aside, and that the case be remanded for a *venire facias de novo*.

Plaintiffs in this court to recover their costs.

Rudd, for plaintiffs; *Crittenden*, for defendants.

Pringle &c. vs. Dawson, and Dawson vs. Pringle &c.

CHANCERY.

Case 32.

Cross writs of error to the Spencer circuit; W. L. KELLY, Judge.

Parties in Chancery. Practice in this Court.

April 29.

Chief Justice BIBB, delivered the opinion of the Court.

Personal representative is the proper party to set aside a conveyance for personalty.

Proper parties not being before the court, the merits not touched.

On the 9th of October, 1824, John Simpson, aged about eighty-two, without wife or children, entered into writings with Bailey Dawson, by which Simpson transferred his property to Dawson, consisting of three slaves, a horse, four head of cattle, and four bonds. Dawson covenanted to support him decently and comfortably, during life, and to bury him decently; and to pay Rebecca Combs, Simpson's niece, two hundred dollars in Commonwealth's paper, if she was living at Simpson's death. Dawson maintained Simpson during life, and buried him decently. Simpson died in six or eight months after the date of the writings; and now this bill is brought by the heirs of Simpson, against Dawson, to set aside the writings as obtained by fraud, and for the insanity of Simpson, as the bill alleges.

The court set aside the writings; and made an interlocutor, from which both parties appealed by consent.

The bill is by the heirs. The administrator of Simpson, dec'd. is no party. Without going into the merits of the bill, the decree must be reversed, because the right belongs to the administrator, to contest the validity of the writings; at least the administrator is an indispensable party, according to the cases of Coons, &c. v. Nall's heirs, 4 Litt. 264; Bailey & ux. v. Duncan's representatives, 4 Mon. 258.

It is therefore, ordered and decreed, that the decree of the circuit court be reversed and annulled; and that the case be remanded to that court, to dismiss the bill with costs.

Dawson to have his costs in both appeals.

Wickliffe and C. S. Bibb, for Pringle; Crittenden, for Dawson.

Sanders vs. Vance.

Error to the Fayette Circuit; JESSE BLEDSOE, Judge.

CASE.

Case 33.

7m 209
1135 161**Practice. Frauds against Creditors. Judgment. Sheriffs.
Damages. Interest. Discretion of Juries.**

Judge OWSLEY, delivered the Opinion of the Court.

April 29.

THIS writ of error is prosecuted by Sanders, to reverse a judgment recovered against him, in an action on the case, which he brought in the circuit court against Vance.

The declaration of Sanders, as originally drawn and filed, was demurred to by Vance, and the demurrer being joined by Sanders, was sustained by the court.

Declaration demurred to, and ruled for defendant.

The declaration so demurred to, contains but one count; but Sanders obtained leave of the court, and filed an additional count, by way of amendment to his declaration. This latter count is in trover for the conversion of fifty milch cows of the value of \$1,000; fifty heifers and steers, of the value of \$1,000; fifty horses of the value of \$1,000; and divers pieces of household and kitchen furniture, consisting of beds, carpets, chairs, tables, table-cloths, China ware, pots and kettles, of the value of \$1,000.

Amended declaration in trover.

Not guilty was pleaded by Vance, but as the court had adjudged the first count of the declaration, to which there was a demurrer, bad, and as that demurrer was not withdrawn, the plea is understood to apply to the latter count only; so that it will not be necessary to take any further notice of the first count, or the decision of the court thereon.

Where, after a demurrer is sustained to the declaration, the plaintiff files an additional count, without the demurrer being withdrawn, and then the defendant pleads not guilty, the plea applies only to the new count.

A trial of the issue was had by a jury, and a verdict of sixteen hundred and seventy-two dollars and eighty cents damages, was found against Vance; but on his motion, the verdict of the jury was set aside by the court, and a new trial awarded. Exceptions were taken to the opinion of the court, in awarding the new trial, and the whole of the evidence made part of the record.

Trial, and verdict for Sanders; set aside, and exceptions.

At a subsequent term of the court, the issue was again tried, and a verdict found by the jury, in favor of Vance. A new trial was then moved for by

New trial, and verdict for Vance. Motion for new trial overruled.

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Sanders; but his motion was overruled, and judgment rendered against him on the verdict. Exceptions were also taken by Sanders, to the refusal of the court to award him a new trial, from which, it appears, that the same evidence was given to the jury at the last trial, that was at the first; and that the same instructions were also given by the court to the jury at both trials.

It is to reverse this judgment, rendered on the last verdict, that Sanders has brought this writ of error.

Error assigned.

It is contended by him, that the court erred at both trials, in instructing the jury; and that the last verdict should have been set aside, but the first ought not to have been; and that judgment should have been rendered in his favor, on the verdict first found by the jury.

Question, on the decision setting aside the first verdict.

It is proper that our attention should be first directed to the first trial, to ascertain whether, in setting aside the verdict then found for Sanders, any error was committed by the court. For, if in setting aside that verdict, the court erred, it follows, from the repeated decisions of this court, that all the subsequent proceedings are erroneous, and of course the judgment which was rendered upon the last verdict, cannot be permitted to stand.

Evidence given on the first trial.

To form a correct opinion, as to the propriety of setting aside the first verdict, it is necessary to understand the material facts which the evidence given to the jury went to prove. They are briefly and substantially these:

Whilst the owner and possessor of the articles of property mentioned in the declaration, with others, Lewis Sanders, under a promise previously made to his brother, (the plaintiff,) executed a deed of mortgage thereof to him, for the purpose of indemnifying his brother against debts for which he had become bound to others as his surety. At the time the mortgage bears date, it was not delivered by Lewis Sanders, nor was his brother present at its execution; but before the expiration of the time required by law, for recording such instruments, Lewis

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Sanders went to the office of the clerk of the court of the county in which he resided; presented the mortgage to the clerk; acknowledged it, and left it with him to be recorded. Before this time, however, Lewis Sanders had been taken in execution by the sheriff, under a *ca. sa.* in favor of other creditors; and he was at the time, not only actually in the custody of the officer, and indebted beyond his means of payment, but was afterwards discharged from imprisonment, on taking the oath of an insolvent debtor. The whole of his property, or mostly all of which he was then possessed, was comprehended by the mortgage, and he continued in the possession thereof, until that part of it, now the subject of contest, was taken by the sheriff of Fayette county, under a writ of *feri facias*, which issued from the office of the circuit court of that county, in favor of Vance. The levy was made by the directions of the agent of Vance, and after the sale, the proceeds thereof was paid to the agent, and a return made on the writ of *feri facias* in favor of Vance accordingly. The property was claimed by Sanders, the mortgagee, at the day of sale, and for his security, the sheriff summoned a jury to inquire into the right. The jury disagreed, and by agreement between the agent of Vance and Sanders, the mortgagee, the sale was to proceed, with an understanding, that Sanders should pursue his redress, not against the purchasers, but against Vance or the sheriff. The *fi. fa.* under which the property was taken and sold, was used in evidence; but it does not appear, that either the judgment or a copy thereof, upon which the *fi. fa.* issued, was introduced. These are the prominent facts proved on the trial, and upon which, in connexion with evidence of the value of the property sold, instructions were given to the jury, and a verdict of \$1,672 80 cents damages, was found by them.

By the instructions of the court, the jury were told, that if they should find from the evidence, that the defendant, in person, or by agent, caused the execution under which the sheriff acted, to be levied upon, and a sale made of the property, which had been previously mortgaged to the plaintiff, in good

Instructions.

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faith, to secure a just debt due to him, and to indemnify him against securityship, that the plaintiff has a right to recover the value of the property, with interest thereon, from the time of sale: *Provided*, the deed of mortgage under which he claims, is not fraudulent; but if Lewis Sanders, the mortgager, was indebted, and in the prison bounds, under the execution of any of his creditors, when the mortgage took effect, and all of his property which was unencumbered, and subject to execution, is contained in the mortgage, and at the time it was made, the mortgager contemplated the oath of an insolvent debtor, the deed of mortgage is fraudulent and void in law, against creditors and purchasers; and that the plaintiff is not entitled to recover the value of any of the property therein contained, of the defendant, if sold under her execution against Lewis Sanders.

Where the sheriff, and plaintiff in the *fiery facias* justify, on the ground the property had been conveyed, or was held in fraud of creditors, he must shew the judgment on which the execution issued.

Whether or not, the conclusions of law in every particular, were correctly drawn by the court, upon the facts assumed, and on the truth of which the instructions to the jury were predicated, is not necessary now to be examined and decided. By failing to produce at the trial, the judgment on which the execution in her favor, against Lewis Sanders, issued, and under which the property was sold by the sheriff, or a copy thereof, the defendant was undoubtedly not in a condition to attack the mortgage from Lewis Sanders to the plaintiff, on the ground of its being fraudulent, as to the creditors, and purchasers of the mortgagor, and thereby defeat the recovery by the plaintiff in this action.

The law was so ruled by the court, in the case, *Lake vs. Billers, &c.* 1 Lord Ray. 733. That was an action of trespass brought against the sheriff, for goods taken. Upon not guilty pleaded, the sheriff gave in evidence, that he levied them in execution, by virtue of a *fiery facias*. The plaintiff made title to the goods by a prior execution, but fraudulent; and by bill of sale made of them, to him, by the officer, (*viz.* the sheriff, predecessor of the defendant.) It was ruled by the court, that the defendant, though sheriff, ought to give in evidence, a copy of the judgment, though it was admitted that it would

have been otherwise if the action had been brought by the person against whom the *fieri facias* issued.

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The same doctrine was admitted and approved by Lord Mansfield, in the case of *Martin vs. Padger, &c.* 5 Burrow, 2633, and has been recognized and followed by this court, in various cases.

The defendant, not being therefore, in a condition to attack the mortgage, on the ground of fraud, it would seem that she can have no good cause to complain of the jury having disregarded the instructions of the court, as to the mortgage being fraudulent or otherwise, as to creditors or purchasers of the vendor, that being a point totally abstract and irrelevant to the matter presented for the determination of the jury. Without, therefore, pursuing and revising the opinion of the circuit court, on abstract and impertinent points, we shall proceed to inquire, whether, in any material point, the court erred in its instructions, to the prejudice of the defendant.

Party who showed no judgment, cannot complain of a decision in favor of a mortgagee holding in fraud of creditors.

The objection taken to the form of action, has no weight with us. That trespass will lie against the sheriff, or against the sheriff and plaintiff, or against the plaintiff alone, provided, the plaintiff assists the sheriff, in favor of one whose property is taken and sold under an execution against another, is as firmly settled, by a train of adjudications, both in England and America, as perhaps any other principle of the common law; and if trespass might have been maintained, no reason is perceived why trover will not lie. To recover for the injury occasioned by the original taking, trespass is, no doubt, the proper action; but the plaintiff generally has the right to waive the original trespass, and bring trover for the conversion of the property taken; and no reason is discerned, nor principle of law known, which takes the case of trespass committed by an officer, under color of process, out of the general principle.

Trespass or trover may be maintained against the sheriff, and the plaintiff in the execution also, who causes the seizure by the mortgagee, for seizing and selling the goods as the property of the mortgagor.

But the instructions of the court go, not only to sustain the action, but according to our understanding of them, they import a decision, that as matter of law, the plaintiff in an action of trover has the right to recover, and the jury are bound to assess damages equivalent to the value of the property con-

Damages in trover and conversion, is the value of the property at the time of the

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conversion,
increased by
the interest
up to the
time of trial,
or not, in the
discretion of
the jury.

verted, and interest from the time of conversion to the trial. Now, it will not be denied, but that the jury, may, in their discretion, give damages equal to the value of the thing converted, and interest, but we know of no law that gives interest as matter of right in such cases, nor are we apprised of any rule of law, that limits and fixes unalterably, the discretion of the jury, in their assessment of damages in such an action. The amount to be assessed for damages, above the value of the thing converted, must, therefore, of necessity, lie within the discretion of the jury, so as not to be made by them to exceed the legal rate of interest, and of course the court should, not, as matter of law, have fixed the amount of damages by its instructions. For this error in the instructions, it cannot, therefore, have been incorrect for the court to set aside the first verdict, and award a new trial.

Verdict dis-
approved for
the lack of
the judgment
to entitle the
creditor and
plaintiff to
seal the
mortgage.

With respect to the last verdict, we also think it should have been set aside. On that trial, the defendant also failed to produce the judgment, or a copy upon which the execution issued in her favor, and therefore, as we have seen, she could not raise the question as to the mortgage being fraudulent, and if not fraudulent, there is no pretext for supporting the verdict which was found by the jury, in her favor.

The judgment must, consequently, be reversed, with cost; the cause remanded to the court below; the last verdict there set aside, and further proceedings had, not inconsistent with this opinion.

*Chinn, Haggin and Loughborough, for plaintiff;
Wickliffe, for defendant.*

CHANCERY.

Wilkinson vs. Perrin.

Case 34.

Error to the Madison Circuit Court; GEO. SHANNON, Judge.

Parties. Practice in this Court. Executor. Distributes.

April 29.

Judge MILLS, delivered the Opinion of the Court.

Bill by L.
Wilkinson.

LYDIA WILKINSON, one of the daughters and devisees of Josephus Perrin, deceased filed her bill for a settlement and distribution of the estate of

her father, making Josephus Perrin the son and administrator, as well as the other distributees, parties to the suit.

WILKINSON
VS.
PERRIN.

Among them, two are dead, to wit: Mrs. Kennedy, late Perrin; and her surviving husband, and her children, are made defendants. William C. Perrin, a son, is also dead, leaving children who are made defendants.

Parties, and
distributees.

Samuel Harris, the husband of a daughter of Mrs. Kennedy, who (with his wife,) is made defendant, sets up a claim for the entire share of one of the other heirs, Mrs. Moore and her husband, who are still living; and he makes his answer a cross bill against the administrator, and the rest of the distributees parties, except that he does not make Kennedy defendant, and inserts Mrs. Wilkinson in lieu of himself; otherwise, his cross bill agrees with the bill of Mrs. Wilkinson, and asserts the same interest. The administrator, with the will annexed, answered both of these bills. Against some of these defendants, publication was made as non-residents.

The court decreed a division of the slaves of the decedant, and both Mrs. Wilkinson and Harris have prosecuted, each, their writ of error, and complain that many errors to their prejudice, were committed by the court below, on the merits of the controversy.

Decree.

In this their complaint is well founded. For not to mention any more, their bill claims a settlement of the personal estate, and the inventory is filed, and it is not shewn how that part of the estate has been expended; and yet, the court has not liquidated that matter, or given them any decree. For this, and other reasons, the decree must be reversed.

In a bill for
distribution,
all ought to
be settled.

But we forbear to go further into an investigation of the merits; because it is the uniform practice of the court, when a decree is reversed, at the instance of one party, to suppose the cause is open as to the errors of both parties, and all will be noticed and rectified, on reversing the decree. We at once discern, that there is a defect of parties to both bills, which forbids the complainants in both, from a decree on the merits.

When the
proper parties
are not
before the
court, this
court will
never decide
the merits,
except when

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vs.
PERRIN.

an insuperable obstacle to the complainants relief is found, and his bill is dismissed, this court will on that ground affirm.

It has been urged, that this defect of parties, ought to preclude these complainants from any redress on their respective writs of error. It is true, when on the merits of a controversy, a bar or obstacle to the recovery of the plaintiff in error is perceived, this court will not reverse, for it would be idle to open a contest which must be fruitless, and end again in a abortion. No error can be committed against a plaintiff in error, who has no right or interest at stake. But it would be rigid, to deny relief against error to a plaintiff who has a meritorious claim, in which he has been defeated by the judgment or decree of the inferior court, barely because he had omitted to make a necessary party. In such case, we reverse for error on the merits, and then leave them to touch the defect of parties, and send the cause back, that these parties may be made, passing the merits generally with much silence; because it would be useless to investigate them minutely, when either party is at liberty, by new pleadings, or evidence, to change them materially, before the cause comes to another hearing.

We will, therefore, proceed to point out the defects in parties.

Where the wife's father dies during the coverture, the husband becomes entitled to the share of slaves and other personalty, and their children have no interest.

We will first however, remark, that it was unnecessary to make the children of Mrs. Kennedy, parties. Their father is still living, and it appears by the will of the testator, that her right accrued during her coverture, and in such case, according to the uniform decisions of this court, her husband having survived her, is entitled to her interest as survivor, and as husband, even without administration on the estate of his wife. Harris, therefore, alone, need be retained in the bill of Mrs. Wilkinson, not as having an interest in right of his wife, as heiress or distributee of her mother, but in his individual right, as purchaser from another daughter of the testator and her husband.

Editor, publisher or printer must certify the publication of

We would further remark, that in the certificate proving the publication against the absent defendants, it does not appear, that the person certifying, was the publisher or printer of the paper. For any thing that appears, this certificate might have been

given by an apprentice in the office, or by some one wholly unconnected with the publication of the paper. It is to the editor alone, that the law has attached the same confidence that is given to the return of an officer. But then, proceedings against absent defendants, have been held, by the uniform decisions of this court, to a strict compliance with the letter of the act, and nothing can be supplied by intendment. This proof was, therefore, insufficient.

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vs.
PERRIN.

the order for the appearance of an absent defendant.

The parties necessary to a correct settlement of this controversy, which are not made, will now be noticed. William C. Perrin, one of the sons mentioned in the will, has, since the death of the testator, departed this life. His heirs or distributees have been made parties, but his personal representative is omitted. It seems to have escaped the counsel who conducted the cause below, that the executor or administrator of W. C. Perrin, could alone take the estate, and that if it was settled with his heirs, it must escape the grasp of his creditors. According to the well settled law of this court, the personal representative ought, therefore, to be added.

Executor, & not the children of a distributee, is entitled to receive, must be made a party to a suit for distribution.

The widow of the testator survived him for many years—perhaps near thirty. The will, after giving specific legacies, gave her all the rest of the estate during life. She renounced the provisions of the will; of course, she became entitled to one third of the lands and slaves, during her life, and one third of the personal estate forever. No dower or distributive portion of the personalty was ever assigned to her. Of course, her personal representative became a necessary party; for only with such representatives can her share of the personal estate be settled.

Executor or adm'r of the widow, who died before receiving her distributive share, must be made a party.

It seems to the court, that there is error in the decree of the court below, on the merits; but as the proper parties were not before the court, this court will not direct what kind of decree is to be there entered; but after a reversal, the cause will be remanded, that the complainants may amend their respective bills, in a reasonable time to be there allowed

Mandate for new parties.

WILKINSON
vs.
PERRIN.

for that purpose, if they shall elect so to do. But if such election is not made, that each bill shall be dismissed with costs, and without prejudice to any future suit, for the same cause of complaint. The defendants in error to pay costs in this court.

Turner and Caperton, for plaintiffs; Haggin and Loughborough, for defendants.

DEBT.

Grant vs. Tams & Co.

Case 35.

Error to the General Court; JOHN P. OLDHAM, Judge.

Jurisdiction. Pleading. Practice. Abatement. Demurrer.

April 30.

Chief Justice BIBB, delivered the Opinion of the Court.

Jurisdiction
of the general
court, not be-
low 500 dol-
lars.

By the act of 12th January, 1825, (session acts, p. 156,) the general court is prohibited from taking cognizance between non-residents and citizens of this State, of smaller sums than five hundred dollars, unless by consent of parties, to be signified in writing.

Judgment for
200 and odd
dollars.

Tams & Co., non-residents, in June, 1825, sued Grant, a citizen of this State, and obtained judgment in the general court, for two hundred and eighteen dollars fifty eight cents. The question is, can the jurisdiction of the court to render judgment for that sum, between these parties, be maintained by the record.

Declaration.

The declaration impleads the defendant, Grant, of a plea of debt, that he render unto them the sum of two hundred and eighteen dollars fifty eight cents, which to them he owes, and from them unjustly detains; for, that the said defendant, on the 12th day of January, 1824, &c. counting on a note for two hundred eighteen dollars, fifty eight cents, payable six months after date. Having set forth this note as made, with a profert, the declaration proceeds: "And whereas, afterwards, to-wit, on the — day of —, at the circuit aforesaid, the said defendant, by his certain other note in writing, promised the plaintiffs to pay them on demand, the sum of six hundred dollars, for value received; which note is now here to the court shewn: And whereas, afterwards,

to-wit, on the — day of —, at the circuit afore-said, the defendant being indebted to the complainants, in the further sum of six hundred dollars, for so much money before that time lent; and accommodated to him, at his special instance and request, then and there promised to pay the same on demand. Yet, the said defendant, although often requested so to do, hath not paid the said sum of money, so due to the said plaintiffs, nor any part thereof, but the same to pay," &c. to the plaintiffs damage \$800.

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vs.
TAMS & Co.

The writ, (which issued after the filing of the declaration, as regulated by statute, to authorize judgment at the return term,) is in debt, for two hundred and eighteen dollars, fifty eight cents, damage eight hundred dollars.

Capias.

The defendant pleaded payment, and *nil debet*.

Plea.

On the trial, after the jury were sworn, the defendant moved the court to instruct the jury, to disregard the first count, as "faulty, and insufficient to entitle the plaintiffs to a recovery thereon in this court;" this was refused, and the defendant excepted.

Motion for
count to be
disregarded,
overruled.

The plaintiffs gave in evidence, the note for two hundred and eighteen dollars fifty eight cents, but offered no other evidence. Thereupon, the defendant moved the court to instruct the jury, to find as in case of a non-suit, as to the second and third counts—this instruction was given—to this the plaintiffs excepted.

Verdict: ex-
ception.

After the plaintiffs were, by the opinion of the court, *non-pros'd*, as to the second and third counts, the defendant moved the court to instruct the jury, to find as in case of a non-suit, upon the remaining count. This point was reserved, and the verdict taken for \$218 58, the debt in the declaration mentioned, with interest, and one cent damage. Judgment, finally, was rendered for the plaintiffs on the question reserved.

Point reserv-
ed.

The plaintiffs below, have, by their counsel, argued in this court, as if their declaration demanded a sum exceeding five hundred dollars. This is a mistake. The declaration demands a debt of \$218 58; that is the whole which the plaintiffs ask, that the

Mode of de-
claring in
debt with se-
veral counts.

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defendant render unto them. Undoubtedly, there are many approved precedents, in which plaintiffs have demanded a large debt to be rendered, and have stated their claims, by one count, to a part thereof, by a second count to another part thereof, by a third count to another part thereof, and so on; all the counts together, making an aggregate to correspond with, and fulfil the debt complained for, and demanded, in the out set, and mentioned in the writ. And it is equally true, by the modern practice and decisions, in actions of debt, the plaintiff may recover less than he demands, by failing in proof, as to any one or more of his counts; he is not, therefore, under the necessity of submitting to a *non pros* for the whole; he may enter a *nolle prosequi*, as to some, or strike out one or more counts, and have judgment on the residue. So are the cases in William's note, c. to 1st Sand. 207, and 1 Chitty's pleadings, 394. In those cases the sum so remaining, raised no question of jurisdiction, the court there, would have been competent to render judgment, even if the declaration had, in the first instance, demanded only the sum due in a single count. But this declaration is unlike any of the approved forms, where a debt is demanded, and various counts are used to state the component parts of the debt demanded. This declaration and writ, demands but a debt of \$218 58; the three counts have not increased the debt actually sued for in the writ and declaration; although, if all the counts were good and true, the plaintiffs might have demanded a debt of \$1,418 58, instead of that actually demanded, of \$218 58. Upon the face of the writ and declaration, no more than \$218 58, are sued for, complained for, or brought into litigation for judgment. By the non-suit upon the second and third counts, the plaintiffs demand was not curtailed, if he had proved all the counts, he could have taken judgment for no more than \$218 58.

Declaration in debt for the detention of \$218, repeated in several counts, is a case for but the \$218, and not within the jurisdiction of the general court.

Upon its face, the declaration is for a sum beneath the jurisdiction of the court, and the complaint should have been dismissed as *coram non judice*, unless there is something in the record which is equivalent to a consent in writing, that the court should take cognizance of the demand.

The motions made by the defendant below, and the taking the verdict, subject to the opinion of the court, on the question reserved negative the idea that the defendant had consented, or did assent, that the court should retain cognizance of the case. His first motion for instruction to disregard the first count, as faulty, and insufficient to authorize a recovery in that court, was an objection for the defect of jurisdiction; no other cause of objection existed to that, and the very terms of the motion shew, that the smallness of the sum was the point of objection. All the other motions, and the taking the verdict, subject to the reserved point, tended to bring down the case to its limit, and to stir the question of jurisdiction, or no jurisdiction.

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TAMS & Co.

Objections to the jurisdiction not waived by motions for instructions and the reservation of point relying on the lack of the jurisdiction.

In *Lightfoot v. Payton*, Hard. 3. it was decided, that two demands of thirty pounds each, united in one action of debt for the purpose of giving jurisdiction to the district court, was improper and unavailing; that court not having cognizance of causes of action of less value than fifty pounds.

Several small demands cannot be united to give jurisdiction.

In *Ormsby v. Lynch*, (Litt. Sel. cases. 303,) it was decided, that after answer in chancery, a defect of jurisdiction of the general court, apparent on the record, was not cured. In the case of *Dorr*, at the suit of the *Lexington Manufacturing Co.* (2 Litt. 256,) the objection was held well taken in the appellate court. In *Lindsey v. M'Clelland*, (1 Bibb, 262,) the want of jurisdiction was taken in the appellate court. This court decided, that the general court was of special and limited jurisdiction. All these cases concur in these positions, that where the want of jurisdiction appears on the record, no plea to the jurisdiction is required—it may be assigned for error in the appellate court, although not made a question to the court below; that in a court of special, limited jurisdiction, the record must state a case within its jurisdiction, that the general court is of such special, limited jurisdiction.

Jurisdiction of the general court, special and limited, must appear in the record.

Upon the face of the declaration, it demands a debt which is beneath the jurisdiction and cognizance of the court. The damages laid, in actions of debt, beyond the legal fixed standard of damages, claimed in a declaration in debt above the fixed

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TAMS & Co.

standard,
cannot aid
the jurisdic-
tion.

cannot confer a jurisdiction. We perceive nothing in the record, which can be construed into a consent on the part of the defendant, signified in writing, according to the meaning of the statute of 1825. The plaintiffs below were straining to give jurisdiction to that court, by color in pleading—the defendant was straining to prevent it, by his motions; but we should strain harder than either, if we were to torture the acts of the defendant below, into a consent to give the court cognizance of the case.

Where the
lack of jurisdic-
tion ap-
pears on plf's
pleadings, no
plea is neces-
sary but a de-
murrer; or it
will avail on
error.

A plea in abatement, to the jurisdiction of the court, is required, only in those cases where there is an apparent jurisdiction; but to be ousted by some fact, not appearing to the court, but which the plea in abatement discloses. When the want of jurisdiction appears by the plaintiff's own shewing, it is difficult to perceive, what plea in abatement can be framed by the defendant, other than a demurrer. It is idle in the defendant, to plead and aver the facts which the plaintiff has confessed; all that he is required to do, is to abide the judgment of the law upon the facts.

Judgment.

It seems to this court, that upon the face of the declaration, the case was of smaller value than five hundred dollars; that there is no written assent between the parties, to give the general court cognizance of the case, and that the general court had not jurisdiction of the matter.

Mandate.

It is, therefore, considered by this court, that the said judgment of the general court be reversed; that the case be remanded, with direction to dismiss the case, as not within the jurisdiction of the court. No judgment for costs in that court, to be given.

Plaintiff in this court to recover his costs.

Crittenden, for plaintiff; *Combs*, for defendant.

Price vs. Wood.

DETINUE.

Error to the Barren Circuit; CHRISTOPHER TOMPKINS, Judge. Case 36.

New trial. Witness.

Chief Justice BARR, delivered the Opinion of the Court.

May 1.

THE plaintiff, Price, claimed the slave in question under a deed of gift by Charles W. Lewis and Charles Hudson. The suit is in detinue against one who hired the slave from the executor of Charles Hudson. Supposing the deed to have been executed by Hudson and Lewis, the right of the plaintiff was undoubted; and no circumstance whatever appears in favour of the defendant, to render the right of the plaintiff doubtful; and this court cannot perceive any ground for the verdict for the defendant, unless the jury went on the ground that the execution of the deed by Hudson was not sufficiently proved. The deed was admitted as evidence; but the execution thereof as to Hudson was not positively proved by the subscribing witness, Hudson Lewis, who was sworn, although we think the evidence was amply sufficient to prove the deed upon Hudson.

New trial moved on the ground that the verdict was against the evidence, overruled below, awarded here.

But the defect arose from the refusal of the court to compel the other subscribing witness to give evidence. This witness, William Lewis, after he attested the deed, proved its execution in the clerk's office, and the deed was laid over for further proof. Since his attestation, he became interested by marrying the grand daughter of Hudson, one of said grantors, by which marriage he had acquired an interest in the estate of said Hudson deceased. This interest was the cause of this witness's objecting to give evidence. He became interested by his own act since he attested the deed. This subsequent interest was no cause for depriving the plaintiff of the benefit of his testimony.

Witness who becomes interested in the matter after his attestation, cannot withhold his testimony.

There was enough however, without the testimony of this witness, to entitle the plaintiff to a verdict; and the court ought to have awarded a new trial.

It seems to this court that the verdict was against the law and the evidence; and should have been set aside on the motion made.

PRICE
vs.
WOOD.

Judgment reversed with costs, and cause remanded for a venire facias de novo.

Plaintiff to have his costs.

Crittenden for plaintiff.

COVENANT.

Townsend vs. Burgher.

Case 37.

Appeal from the Estill Circuit; GEORGE SHANNON, Judge.

Bank note contracts. Statutes. Petition and summons.

May 1.

Judge MALLS, delivered the Opinion of the Court.

Covenant for the hire of a slave, in bank notes, and to clothe and return the slave &c.

THE plaintiff below sued the defendant, in covenant, on a writing dated 12th March, 1825, stipulating the payment at different times, two certain sums, both to be paid in "*Commonwealth's money*." The same instrument further expresses, that this payment was for the hire of two slaves; and adds the stipulations that the defendant shall use the slaves with moderation, shall clothe and feed them well, and return them at the expiration of the term of hire.

Declaration for the non-payment of the bank notes.

The plaintiff assigned breach only in the failure to pay the stipulated hire, and failed to assign any breach on any of the remaining stipulations in the instrument. The plaintiff endorsed on his declaration a willingness to accept paper of the Bank of the Commonwealth, according to the act of assembly which allows a recovery of that currency in kind. The defendant at the time offered proof of the value of the paper when it became due, in currency of the United States.

Contracts for the payment of Bank notes, including within them other stipulations, are not within the act authorizing the recovery of Bank notes in kind.

The defendant objected to this proof. So that the question arose whether this contract comes within the act which allows a recovery of bank paper in kind, or whether it must be scaled. The court decided for plaintiff, and defendant has prosecuted this writ of error.

We conceive that the contract is not within the act.

Notwithstanding the plaintiff has waived all other breaches which might have been assigned, and

TOWNSEND
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has gone for the failure to pay the stipulated sum, yet we cannot conceive that he has brought his covenant within the act. It is clear that breaches might have been assigned for a failure in the remaining stipulations, and all be tried in the same action with the failure to pay the hire. It is equally clear, that in such action, the plaintiff could not recover the hire in bank paper, and damages in gold or silver for other breaches, and present the anomaly of a mongrel verdict and judgment—part in bank paper and part in specie; and that he could not liquidate the remaining breaches in bank paper. In that case the contract would be without the act, yet in this case the plaintiff contends that it comes within it, at his election, without consulting his adversary. We conceive it was not contemplated by the legislature to bring some contracts part within the act, and leave part without; or that they intended that the courts should give two judgments, instead of one, on the same action, or should render one judgment and direct a portion of it to be discharged in paper and a portion in gold or silver coin; or that a contract should, in one mode of proceeding, be within the act, and in another mode be without. It is true the plaintiff has his election, to go for the paper, or to scale it, in contracts within the act; but to give him this election, it must apply to the entire contract or to no part of it. The act expresses, "any contract for the payment of notes of the Bank of Kentucky or of the Commonwealth, or for the payment of the current paper of the state." These expressions must be construed exclusive of other contracts including within them other stipulations, the breaches of which could not be recovered in bank paper.

This accords with the construction of the act regulating and authorizing proceedings by summons and petition, as given by this court. A note for the direct payment of money, has been held not to include notes for the direct payment of money and for other things therein stipulated.

Like construction of the act allowing the action by petition and summons on obligations for the direct payment of money.

Judgment is reversed, with costs; and verdict set aside, and cause remanded for new proceedings, set inconsistent with this opinion.

Caperton for appellants; Turner for appellee.

CHANCERY.

Hughes &c. vs. Craig.

Case 36.

Error to the Mason Circuit; W. P. ROPER, Judge.

Jurisdiction. Garnishee. Non-residents.

May 2.

Chief Justice BIBB, delivered the Opinion of the Court.

Bill by the assignee of a promissory note on a non-resident, alleging obligor's wife's father had died abroad, and certain persons being indebted to him in the circuit, administration had been granted by the court of the county, to residents of an adjacent county, and praying for a decree for the money against the administrators, or their debtors.

CRAIG, as assignee of Johnston, held a note on Allen B. Hughes, on which he claims a balance as due of \$228 54. In March 1822, Craig exhibited his bill against said Hughes and his wife, in the Mason circuit court, stating that they were non-residents; that Betsey, the wife of said Hughes, as the daughter of Richard Tilton deceased, was entitled to a large sum out of her father's estate; that John Tilton and Enoch Tilton administered upon the estate of said decedent in the county of Mason, and he apprehends that the administrators will pay off the share of said wife to her husband unless restrained; therefore they obtained an order restraining the administrators from paying the sum due Craig. By an amended bill of the 29th Nov. 1822, it is stated that Tilton died in the state of Indiana, but that said John and Enoch administered in Mason county in this state: that a much larger amount than the complainant's demand against Hughes, is due to the administrators of Tilton from John Robertson and Jilson Hambrick, of Mason county, and they are made defendants, with a prayer that they disclose how much they owe, and for a decree against them for the amount of Craig's demand, alleging that the administrators live in Harrison county, and will divide these debts when collected, with Hughes and the other distributees of said Tilton deceased.

Process executed on resident defendants in their proper counties, and publication against non-resident debtor.

An order of publication was made against Hughes and wife, and a subpoena to Harrison county was executed on John Tilton and Enoch, the administrators, before the amended bill was filed; afterwards a subpoena to the sheriff of Mason was executed on Robertson and Hambrick.

Decree of the circuit court.

Upon hearing, the bill is taken *pro confesso* against all the defendants for want of appearance and answer; and a decree is made against Allen B. Hughes and the said administrators of Tilton, and Robertson and Hambrick, that they pay Craig his demand,

and in case the administrators pay it, that they shall be entitled to a credit for so much out of the share of Hughes and wife in the estate of the decedent; and in case said Robertson or Hambrick shall pay it, the one so paying shall be entitled to a credit for so much due by him to the administrators.

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vs.
CRAIG.

The decree against Robertson and Hambrick cannot be sustained. Craig has stated no case to justify the court in diverting the rights and credits of the decedent from the due course of administration, and from the hands of the administrators. They were not indebted to Hughes, nor his wife, nor had any effects belonging to them.

Circuit court
of Mason
where the ad-
ministrators
did not reside
and were not
served with
process, had
not jurisdic-
tion.

The process to Harrison against the administrators was not authorized. There is nothing in the bill which laid a sufficient foundation for the jurisdiction of the Mason circuit court: Hughes and wife were absentees, living without the jurisdiction of the court: Robertson and Hambrick were not debtors to Hughes, and therefore were not proper garnishees; they had no effects of Allen B. Hughes in their hands: and the other defendants, the administrators, were in Harrison, out of the jurisdiction of the circuit court of Mason; and therefore the whole proceeding is irregular and unwarranted.

It is the opinion of this court that there is no foundation in the bill for the jurisdiction of the circuit court of Mason. It is therefore ordered and decreed, that the decree of the said circuit court be reversed, that the case be remanded to that court, with direction to dismiss the bill and amended bill, as being for matters not proper for the cognizance and jurisdiction of that court.

Plaintiffs in this court to be paid their costs.

Crittenden for plaintiffs; *Triplett* and *Brown* for defendants.

APPEAL TO
THE CIR. C.
Case 39.

Sturgus' adm'r. vs. White's adm'r.

Error to the Madison Circuit Court; GEO. SHANNON, Judge.

Justices of the Peace. Constables. Appeals.

May 2.

Judge OWSLEY, delivered the Opinion of the Court.

It cannot be objected in the circuit court for the first time, that the warrant had been returned and the judgment rendered against the appellant, defendant below, by a justice out of the district where defendant resided.

It seems to this court that it was in violation of that provision of the act of assembly concerning appeals from the judgments of justices of the peace, which forbids the dismissal of any appeal for an irregularity in the proceedings had before the justice, and which requires the appeal to be tried on its merits in the circuit court as though no trial had been previously had thereon, to allow the appellant in the circuit court (defendant in the warrant) for the first time to object on the trial of the appeal to the return made by the constable of the warrant to a justice without the district in which the defendant in the warrant resided, and that it was erroneous for the circuit court to sustain the objection taken on that ground, and to instruct the jury to find in favour of the appellant.

The judgment is therefore reversed with cost, the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

Breck for plaintiffs; Caperton for defendants.

EJECTMENT.

Smith vs. Mahan &c.

Case 40.

Appeal from the Bourbon Circuit; GEORGE SHANNON, Judge

Conveyances. Coparceners. Warranty. Estoppel. Co-tenants. Demises.

May 2.

Judge OWSLEY delivered the Opinion of the Court.

Verdict and judgment in ejectment for plaintiff, and appeal by defendant.

THIS writ of error is prosecuted by Smith to reverse a judgment rendered against him in an action of ejectment in which he was defendant.

The trial was had on the general issue, and the verdict upon which the judgment was rendered, was found by the jury in conformity to the instructions of the court.

So much of the proceedings as are necessary to an understanding of the question presented for the determination of this court may be discovered from a brief summary of facts. SMITH
vs.
MAHAN &c.

Many years ago a grant issued from the commonwealth to John Mahan for a tract of land, part of which is now the subject of contest, and upon his death, the title to the land descended upon his children and heirs, Wm. Mahan, Thomas Mahan, Raney Mahan, Agnes M. Mahan, Elizabeth Clarkson and John R. Mahan. The land was afterwards sold, and deeds of conveyance executed by Wm. Mahan, Agnes Mahan, Raney Mahan, and Charles Clarkson the husband of Elizabeth Clarkson, to others, under whom Smith, the defendant in the court below, and plaintiff in error, holds. In each of these deeds there is a warranty of the title by the respective vendors against themselves and all persons claiming by, through, or under them. Subsequent to the date of these deeds, John R. Mahan, one of the children of the grantees from the commonwealth, departed this life, and being without children, the title which he derived by inheritance from his father, descended upon his brothers and sisters in coparcenary, of whom Wm. Mahan, Raney Mahan, and Elizabeth Clarkson are part. To recover the land to which they became thus entitled by descent from their brother, Wm. Mahan, Raney Mahan, and Elizabeth Clarkson, brought this ejectment against Smith, who is in possession thereof. The declaration contains several demises; but no question was made in the court below applicable to any but the first, and that is a joint one in the names of Wm. Mahan, Raney Mahan, and Elizabeth Clarkson. Statement of
the facts.

After the evidence was closed, the court instructed the jury that the lessors in the first demise laid in the declaration, had shewn title to one fifth of the land in contest, and that a verdict for that much should be found against the defendant in that court.

The question is, as to the correctness of the instruction.

It is perfectly clear that the instruction cannot be maintained upon the title which was derived by two Where one
coparcener

SMITH
vs.
MAHAN &c.

executes a deed of conveyance for the whole land, his warranty, tho' against only those claiming under him, will estop him from asserting title, against his alienee or vendee, to an interest which afterwards descends on him from his coparceners.

—Otherwise, had the conveyance been of only the grantors interest.

In an action on a joint demise, title must be proved in all the lessors, or nothing can be recovered.

of the lessors from their deceased brother. Upon the death of that brother, the title which he then possessed no doubt descended by operation of law to the three lessors in coparcenary with their other brothers and sisters; and if no act had been previously done by any of them to prevent their recovery, the interest so derived by them from their brother, might have been recovered in the present action. But it appears that two of them, William and Raney Mahan, had, before the death of their brother, executed to persons under whom Smith claims, deeds of conveyance, with warranty against them and others claiming under them, for the same tract of land to which their brother held title in coparcenary with them, and to recover which this action is brought; so that by force of their warranty they must necessarily be estopped to assert against their vendees or others claiming under them, any title thereafter derived by descent or otherwise. Such, it is true, would not have been the effect of the warranty, if, as was contended in argument, the deeds were construed to import a conveyance of nothing more than the undivided coparcenary interest to which at the time, the vendors were entitled; but according to no rule of interpretation can the deeds, or either of them, be so construed. The language used in each deed plainly imports a conveyance of the whole tract, and neither deed contains any expression calculated to limit the operation of the warranty to a part of the title only. Being therefore concluded by their warranty, neither William nor Raney Mahan can have shewed any title to any part of the land in contest.

But with respect to the other lessor, there is no such estoppel. By any thing contained in the record, she is not proved to have made and executed in the form required by law any conveyance by which she can be concluded from asserting the title derived by descent from her brother; and if no other objection to her recovery existed, the court might with correctness have instructed the jury to find against Smith to the extent of her interest in the land. But she has united in a joint demise with the other lessors, and the rule is well settled that under such a de-

mise there can be no recovery, though one be proved to have title, if the others have none.

SMITH
vs.
MAHAN &c.

Without therefore noticing any other point, it is perfectly clear that the court erred in the instruction to the jury, and for that cause the judgment must be reversed with costs, the cause remanded to the court below, and further proceedings there had not inconsistent with this opinion.

Hanson for appellant; *Talbott* for appellees.

Miller and wife vs. McClelland.

DETINUE.

Error to the Bourbon circuit; GEORGE SHANNON, Judge.

CASE 41.

Slaves. Partus sequitur ventrem. Devises. Construction.

Judge MILLS, delivered the Opinion of the Court.

May 3.

WM. McClelland, by his will, devised all his slaves, except one, to his wife during her life and the lives of two sons, Alexander and Elijah, who lived with her, among which was a young female slave named Milly.

WM. McClelland's will.

To his son Elisha, after the death of his wife and two sons, whose lives were also to end the particular estate, he devised thus:

"At the death of Martha his, [Elisha's] mother, and Alexander and Elijah, Elisha is to have all the land and slaves that is bequeathed to the said Martha McClelland, except one slave named Milly."

The next we hear of Milly in the will, he bequeaths her thus:

"I give and bequeath to my daughter Patty Orr McClelland, daughter of James McClelland, at the death of her grandmother McClelland, a feather bed and bedding, horse and bridle, with the slave named Milly that is within excepted; and if she should die without an heir, the slave Milly is to go to Elisha, and the other property likewise."

The testator died in 1812, and his wife survived till 1826. Before her death the sons Alexander and

Facts stated.

MILLER & W. vs.
McCLELLAND.

Elijah died, as well as the slave Milly. But after the death of the testator and before the death of Milly, she had four children, three of which are now the subject of controversy. On the death of the widow of the testator, Elisha succeeded to the possession of her estate, and among the rest to these four young slaves, the children of Milly. Putsey Orr McClelland, who had in the mean time intermarried with Joseph Miller, with her husband brought this action of detinue, claiming these four slaves, the children of Milly, as following the devise over of the mother. Elisha claims them as being the remainder man after the death of his mother.

Decision of
the circuit
judge.

The court below decided in favor of Elisha; and Miller and wife have prosecuted this writ of error.

Question
stated.

From this statement of the case, it will be seen that the question is involved, to whom does the increase of slaves during a life estate pass—do they belong to the estate of the tenant for life, or go to the remainder man?

Children of a
female slave,
born in the
time of an es-
tate for life,
go with her
at the termi-
nation of the
particular es-
tate, to the
remainder
man, and not
to the tenant
for life.

This question came before this court in the case of *Murphy vs. Riggs*, 1. Marsh. 532, and it was then held, that such offspring passed with the devise over to the remainder man. It is true that express adjudications on this point, both in Virginia and this country, are rare; but it seems to be a historical fact, that from an early period of Virginia, that state adopted the maxim, *partus sequitur ventrem*, with regard to such offspring; and it probably arose out of the decisions of her colonial courts, of which we have no report, and it became so firmly established as a rule of property, that none now question it in her courts. Whatever might be our opinions, was the question new, we would not lightly shake a rule so long acquiesced in, and especially after it has several years since been sanctioned by this court. Although the decision is solitary in this country, yet it has remained unshaken for years, and as it is one which directly touches and settles the title to property held valuable, and often changing owners, it must have been the rule since adopted in determining the ownership of many slaves. By it therefore the question must be considered at rest.

But is contended here that the will shews a different intention; that Elisha McClelland is made by the will the remainder man; that the will shews an intention to pass the estate contrary to the general rule, because by the will, all is given to Elisha at his mother's death, "Milly excepted," and of course her offspring was not excepted.

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vs.
McCLELLAND.

Devise of all testator's slaves for life with remainder of all except Milly to Elisha, and then a devise of Milly to P. entitles P. to the children born of Milly during the particular estate.

If this rule of interpretation is adopted, that when Milly is excepted her offspring is not, it would seem to follow that when she was given to the mother, and her offspring not mentioned, her after born children did not pass, which would defeat the title of Elisha, and leave the offspring of Milly not disposed of by the will, which cannot be presumed.

The right way to ascertain the meaning of the testator, when he excepts Milly in one clause, and grants her in another, is to place ourselves back in point of time, and in his situation when he spoke. Then, Milly alone existed, and was in the mind of the testator, and of course she alone was granted or excepted. If she increased in the mean time, which might be expected, such offspring was left to pass as she passed, or to be excepted when she was excepted, as by the rule *partus sequitur ventrem* her offspring would be included with her. Then the testator left none of her offspring undisposed of, and his intention would be effectuated. It was therefore necessary for the testator to shew that he intended to dispose of the offspring of Milly different from herself, by some expressions more unequivocal than those relied on, before we can say it was his intention to depart from the general rule. The decision of the court below is therefore erroneous.

Judgment reversed with costs, and verdict set aside, and cause remanded for new proceedings not inconsistent with this opinion.

T. Marshall and Depew, for plaintiffs; Crittenden and Talbot, for defendants.

**FORCIBLE
ENTRY AND
DETAINER.**

Case 42.

Smith vs. Morrow.

Appeal from the Fleming Circuit; WM. P. ROPER, JUDGE.

Practice. Notice to produce. Writings and proof of their contents. Evidence. Boundaries. Surveys. Possession. Leases.

April 10.

Judge OWSLEY delivered the Opinion of the Court.

MORROW sued out from a justice of the peace a warrant against Hardage Smith, for a forcible entry and detainer, and such proceedings were thereon had as that Smith was found guilty by the inquest of the jury. The finding of the jury was traversed by Smith, and the cause brought to the circuit court. Issue was taken to the traverse by Morrow, and on trial in the circuit court, verdict and judgment rendered against Smith.

Case formerly held.

The case was then brought by Smith to this court, and the judgement was reversed and the cause remanded for further proceedings. The report of the case in this court is contained in 5th Lit. Rep. 210.

Trial after the return of the cause.

Upon the return of the case to the circuit court, another trial was there had, and verdict and judgment again recovered by Morrow. From that judgment Smith has appealed.

The questions made by the assignment of error grow out of exceptions taken to the opinion of the court at the last trial.

It seems that where a writing is produced by one party, on notice from the other, and after being read is filed with the clerk, and a new trial being awarded, the paper is afterwards improperly taken from the custody

It appears that at the first trial a written agreement between Weathers Smith, (under whom Hardage Smith claims the land in contest,) and Morrow was, upon notice given to him by Smith for that purpose, produced as evidence by Morrow, and after being used before the jury, was again handed to Morrow, and that some days before the last trial, notice was again given by Smith to Morrow, for the latter again to produce the writing at the trial, but on the trial when called on to produce the writing, Morrow refused to do so, at the same time neither admitting or denying the writing to be in his possession; whereupon the counsel of Smith moved the court for a rule to compel Morrow to produce the writing, but the court refused to make any rule up-

on the subject, and informed the counsel of Smith that he was at liberty to prove the contents of the writing by parol evidence, which was done accordingly.

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vs.
MORROW.

of the clerk,
the court
may compel
its produc-
tion.

The propriety of the refusal of the court to make the rule upon Morrow to produce the writing, is the first point to which the attention of this court will be directed. If, after the writing had been produced on the first trial, it had been filed with the clerk among the papers of the cause, and not withdrawn by Morrow until the last trial, there would certainly be much stronger reason for the rule which was applied for by the counsel of Smith. The obtaining the possession of the writing under such circumstances, and refusing to produce it for the inspection of the jury, might, with at least great plausibility, be contended to be a fraud upon the law and justice of the court, and would demand of the court an exertion of all legitimate authority to elude the effects of such a fraudulent attempt.

But instead of being lodged with the clerk, the writing, after being used on the first trial, was retained by Morrow; and instead of its being proved that he had the writing with him, there is no evidence conducing to shew that Morrow ever had such a paper, except what relates to his possession at the previous trial; so that there is nothing in the cause going to fix fraud on Morrow in refusing to produce the writing, nor any thing to distinguish this case from the common case of a party having the possession of a paper which his adversary conceives would be useful to him as evidence. In such a case it is no doubt proper that notice should be given to the party in possession of the paper to produce it; not however, as seems to have been supposed by the counsel of Smith in the court below, to enable the party desiring the paper, through the instrumentality of the court, to compel the other party to produce it, but to enable him, in case the paper is not produced, to use secondary or inferior evidence as to the contents of the writing. The best evidence in the power of the party must always be produced, and as written evidence in legal contemplation is superior to that of parol testimony, it

But where, after the paper had been used in such case, the party who produced it takes it back without its being committed to the custody of the clerk, he cannot be compelled to reproduce it.

SMITH
vs.
MORROW.

No party to the action can be compelled by a court of law to produce his papers to be given in evidence against himself.

But if he declines after due notice, the contents may be proved.

Declaration of the occupant made at the time of his settlement, of un-
der whom and how he took the possession, are part of the *res gesta*, and competent to prove the manner and extent of the possession.

is incumbent on the party, before he can use parol testimony to prove the contents of a writing, to use all legal means to obtain the writing, and if it be in the possession of his adversary to notify him to produce it. But it is incompatible with the most firmly settled principle of the common law, to compel a party at law to give evidence against himself, which would undoubtedly be the case were the court to compel either party, at the instance of the other, to produce a paper which he might think would go to his prejudice.

It was not therefore incorrect in the court to refuse the rule moved by the counsel of Smith, and to leave him to prove the contents of the writing by secondary evidence.

It was proved that Morrow settled on the tract of land, where he resided at the time of issuing the warrant by the justice, in 1794, and for the purpose of proving under whose title the settlement was made, a witness was asked by the counsel of Morrow, as to what were Morrow's declarations as to the person under whom he settled, at the time of his settling upon the land; but the question was objected to by the counsel of Smith, and the objection overruled, and the question answered. The next point to be noticed is, was the court correct in permitting the witness to answer the question propounded?

The decision of the court, in suffering the question to be answered by the witness, is so obviously correct, that we have thought it scarcely necessary to bestow any remarks upon it. The intention with which the settlement was made by Morrow, so unites and connects itself with the act of settlement, and has such an important influence upon the extent of the possession which was acquired by that settlement, that argument must surely be useless to prove the propriety in a contest like the present, involving the extent of possession of a witness, whilst speaking as to the fact of settlement, also stating what the declarations of Morrow were in relation to the claim under which he settled at the time of his making the settlement. The declara-

tions which were then made as to the claim under which Morrow settled, are of themselves facts which connect themselves to, and form a part of, the fact of settlement and possession by Morrow; and as part of the *res gesta*, were doubtless properly allowed to be detailed in evidence to the jury.

SMITH
vs.
MORROW.

The land in contest is claimed by the parties under adverse interfering patents from the commonwealth; those under which Smith claims are two in number, one in the name of Weathers Smith for four hundred eighty-seven and a half acres, dated the 10th of May 1785, and the other in the name of Charles Morehead for two hundred and three acres, also dated the 10th of May 1785; and Morrow claims under a patent to Wm. Trimble for seven hundred and fifty acres, dated the 18th of May 1800. One great object with Morrow on the trial in the circuit court, was to prove that by his entry, settlement and improvement of the land, he acquired the possession of all the land included within the boundary of Trimble's patent, and which is also contained in the patents of Smith and Morehead under which Smith claims; and that the possession so acquired continued in him until the entry was made by Smith, which is complained of in the writ of forcible entry and detainer, sued out from the justice of the peace in this case. To that object the evidence of both parties was directed on the trial, Morrow endeavoring to establish the possession of the land in contest at the date of the entry to be in him, and Smith endeavoring to repel the fact, and prove that some years prior to the time of the forcible entry alleged in the warrant, the possession of the land was in him, under the elder patents of Smith and Morehead, and that he has retained the possession ever since.

Controversy
on the fact of
possession.

To maintain the position contended for by him, Morrow proved that as early as 1794, he settled upon the land contained in Trimble's patent, claiming under that patent, and that he has continued to reside thereon and extend his improvements ever since; and although his settlement was not originally made within the boundary of either of the patents under which Smith claims, he proved that as

Morrow's ev-
idence of pos-
session.

SMITH
 VI.
 MORROW.

early as 1798, and before any possession was taken under the patents of Smith or Morehead, he extended his improvements within the boundaries of those patents; at the same time claiming to hold under Trimble. It was also proved that before he settled upon the land, Morrow married the daughter of the patentee Trimble, and that the settlement was made under a promise of the patentee to give him two hundred acres of the land; but there was no evidence introduced conducing to prove that any precise boundary for the two hundred acres, was agreed on between Morrow and the patentee before the settlement; though it is to be inferred from the fact of Morrow having as early as 1798, extended his improvements within the patent boundaries of Smith and Morehead, and other acts of ownership which he is proved to have extended over the land, that Morrow understood he was to have, and expected to receive from the patentee, Trimble, a conveyance for the land in contest. There was no certified copy from the books of the surveyor, of the survey originally made for Trimble, introduced as evidence; but the patent of Trimble was used in evidence and that recites the survey to have been made for Trimble as early as July 1785; and it was satisfactorily proved that the boundary of the survey so recited in the patent, includes the land in contest. It was also proved, that in 1802 the patentee, Trimble, conveyed the land in contest, together with other land, to Morrow and R. Trimble, and that R. Trimble has since conveyed his interest to Morrow.

Instructions,
 moved by
 Smith, over-
 ruled by the
 court.

After the evidence was through, the following instructions to the jury were moved by the counsel of Smith, but refused by the court, to-wit: "If Morrow, when he originally entered upon the claim of Trimble, had no metes and bounds or quantity of land assigned him, upon which he could make lawful entry, that his possession acquired is circumscribed to his actual close, until he received with R. Trimble a deed of conveyance from Wm. Trimble, the patentee in 1802."

The next question therefore is, ought the instructions moved to have been given?

We think not. There would have been great

propriety in circumscribing the possession of Morrow to his actual close, provided, that whilst that possession continued, the claim of Trimble, under which it was held, had no prescribed and ascertained boundary; for, as the settlement of Morrow was made, and his improvements extended, under the claim of Trimble, it would be difficult, and indeed impracticable, to extend the possession thereby acquired beyond Morrow's actual close, if there was no boundary to the claim of Trimble by which the possession could be circumscribed and limited. But it is apparent from the patent of Trimble, that his claim had been actually surveyed long before Morrow entered and settled upon the land; and as that entry and settlement was made under the claim of Trimble, though under a promise to give his son-in-law two hundred acres, the boundary of which was not defined, it is most reasonable to presume that by entering and settling upon the land, it was intended by Morrow to take the possession of the entire tract, as fully as could have been done by Trimble, if the settlement had been made by him. It is not designed to say, that if the settlement had been made by Trimble, he would thereby have gained the possession of his entire survey.

The settlement was not upon the land contained in either of the elder patents, which had then issued, and under which Smith now claims; and we should not by construction extend a possession lawfully taken, outside of the elder grants of others, so as to encroach upon and conflict with their legal right under those grants. But whilst it is conceded that the original settlement might not be construed to give a possession within the elder patents of Smith and Morehead, it is perfectly clear, that so soon as the improvements were extended within the boundary of those patents, a possession was acquired within those patents, not limited by the actual close or improvements, but extending to the limits of the boundary of Trimble's survey, under which the settlement and improvements were made.

It results, therefore, that in refusing the instructions moved, the court did not err.

The next question relates to a decision of the court

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MORROW.

Settlement of the son-in-law of the former patentee within the interference between his patent and an elder grant unoccupied, under a promise of a gift of a certain number of acres, but not demarked, gives the possession to the extent of the former patent.

If the original settlement were outside the elder patent, and afterwards the improvements extended within the elder patent, the possession of the interference commenced with that extension of the improvements within the elder grant.

Evidence

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that one of the parties had failed to list the land in contest for taxation, is not competent to prove he had surrendered and not held the possession.

in rejecting, as incompetent evidence, copies of various extracts, certified by the clerks of the county courts of the counties in which Morrow resided, to be true copies from the books of the commissioners of the tax in various successive years. It was contended on the trial in the circuit court, and attempted to be proved by Smith, that as early as 1808 the possession of the land in contest was surrendered up to him by Morrow; and as evidence conducing to support that position, the rejected copies of extracts from the books of the commissioners of the tax for the year 1803, and the successive years down to 1821, were offered to be read to the jury by him.

We are unable to discern the rule of evidence which can have been violated by the exclusion of those copies of extracts from the jury. From those copies, it would seem that Morrow has failed to enter for taxation the land in contest; and if in truth such has been his conduct, he may have been remiss in the discharge of his duty to the government, but the connexion between an omission to list the land for taxation and the fact assumed by Smith, that the possession of the land was surrendered to him by Morrow, is not perceived, so as from the fact of omitting to list the land, to infer the fact of a surrender of the possession. The motives for omitting to list land for taxation may be so various, that from the fact of omission, no unfavorable inference against a continuance of the possession can with propriety be drawn. Whether there be or be not a possession in fact of land, depends not upon a faithful performance of his duties to government by the person claiming to be possessed. Government may fail to receive her taxes for land, and the possession thereof nevertheless retained by the delinquent; and in controversies about the possession, such as the present, to allow the claims of government or the delinquency of either party to the government to be drawn in question, would in its consequences, instead of casting any light upon the matter in issue, tend to embarrass and perplex the deliberations of the jury, by drawing their attention to irrelevant and impertinent subjects.

The remaining point made, by the assignment of

errors, relates to the refusal of the court to award a new trial, on the motion of Smith.

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That decision involved no question of law that was not decided by this court when this cause was formerly here, and we would again refer to that opinion for a full exposition of every legal question which relates to the merits of the contest. With respect to the facts involved in the application for a new trial, we would barely remark, that they were left with the jury, whose province it is to weigh the evidence and decide the facts; and we cannot say, that in coming to the conclusion it did, the jury has transcended its province, and found a verdict which should have been set aside on the ground of its being against evidence.

New trial refused.

The judgment must be affirmed, with cost.

Talbot and Reid for appellant; Crittenden for appellee.

Gentry &c. vs. Hutchcraft.

Error to the Madison Circuit; GEO. SHANNON, Judge.

PETITION &
SUMMONS.
Case 43.

Lost process. Exhibits. Record. Practice. Error. Damages.

Judge OWSLEY delivered the opinion of the court.

April 30.

Hutchcraft filed in the clerk's office of the Madison circuit court, a petition against James H. Gentry and David Gentry, accompanied with their note to him for the payment of four hundred and forty-two dollars and sixty-eight cents.

Petition filed.

On the 18th of February 1824, the clerk issued a summons, in favor of Hutchcraft, upon the petition, against both the Gentrys, returnable to the March term of the court thereafter. The summons was returned by the sheriff, "Executed on James H. Gentry the 26th of February, 1824, by delivering to him a copy of the within petition and summons, and David Gentry not found."

Summons
and sheriff's
return.

At the March term 1824, an order was made, "that the cause be continued and that an alias process issue, returnable to the next term of the court."

Continuance,
and order for
an alias.

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CRAFT.

Judgment by
default.

Process not
executed on
one defend-
ant, and that
assigned for
error.

Matter re-
turned by the
certiorari.

Entry on the
records of the
circuit court
of the proof
that an alias

At the June term no entry was made in the cause, there being, as the clerk certifies, no court at that time.

At the September term, the cause was called, and the Gentrys failing to appear, judgment was rendered against them for the amount of the note mentioned in the petition, together with interest and cost.

To reverse that judgment, the Gentrys have prosecuted this writ of error with supersedeas.

The alias summons which was ordered by the court to issue at the March term, is not contained in the original transcript of the record filed in this case; nor does it appear from any thing contained in that transcript, that the alias summons ever issued or that any process was served upon David Gentry, one of the defendants in the circuit court before judgment.

It is assigned for error by the Gentrys, "that the court erred in rendering judgment against them; no process having been served upon David Gentry."

Tested by the original transcript of the record, the judgment undoubtedly could not be sustained. To have authorized the judgment, both of the Gentry's should have been served with process, and by the original transcript there appears to have been no process served upon David Gentry.

But it being suggested on the part of Hutchcraft, that there was a defect or diminution in the original transcript of the record, a *certiorari* was ordered to the clerk of the circuit court to supply the defects in the transcript. The *certiorari* has been returned, accompanied with an additional transcript certified by the clerk to be a correct copy of proceedings had at the March term, 1827, on notice and motion by Hutchcraft, as the same remains in his office.

By this additional transcript it appears that in pursuance of notice given to the Gentrys for that purpose, Hutchcraft moved the circuit court of Madison, at the March term, 1827, and obtained an order not only certifying, but containing the evi-

dence upon which the order was made, "that satisfactory proof was made to the court that in the case of Hutchcraft against James H. Gentry and David Gentry, petition and summons formerly in this court, and in which judgment was rendered at the September term of this court, 1824, and which case is now pending in the court of appeals, an alias petition and summons was regularly issued by the clerk of this court, on the 4th of May, 1824, directed to the sheriff of Madison county, and that a copy thereof was duly served upon the defendant David Gentry, by a deputy sheriff of said county of Madison, on the 22d of May, 1824; and that said alias with the proper return of the said sheriff thereon, and of which the following is a copy, to-wit:" [Here follows a true copy of the original petition in this case and alias summons thereon returnable to the June term, 1824, and upon the summons is the following return of the sheriff—~~Executed~~ the 22d of May, 1824, by delivering a copy of the within petition and summons to the within defendant David Gentry,]—"was duly filed with the papers in said suit, in said clerk's office, when said judgment was rendered, and that the same has since been lost or mislaid, so that the same cannot now be found in said office."

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subpoena had
been issued,
executed,
and returned.

The evidence contained in the transcript, and upon which the order appears to have been made, is in part written, and part oral. The written evidence consists of an entry in a memorandum book of the office of the clerk, in the following words—"4th May, 1824. Hutchcraft against Gentrys alias pet. and summons issued." An endorsment on the docket of the June term 1824, opposite the suit of Thomas Hutchcraft, against James H. and David Gentry—petitions and summons, "alias issued"—and in the place where the sheriff's returns are entered, "Ex'd 22d May 1824."

Evidence on
which the cir-
cuit court
made the en-
try.

The oral evidence consists of the testimony of the clerk, his deputy, the deputy sheriff, and the attorney who prosecuted the suit for Hutchcraft, all of whom concur in proving conclusively that the alias summons not only issued, but was actually served upon David Gentry, according to the import of

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the written memorandum, and that it was in fact returned executed, and was with the papers of the cause at the time judgment was rendered by the circuit court, but the same is now lost or mislaid so that it cannot be found.

Loss of the process, and sheriff's return may be supplied by oral proof made before the circuit court at a subsequent term, and there recorded, and thus a judgment upheld.

If it be possible to supply the loss of the summons and sheriff's return thereon by proof in the court of original jurisdiction after the term is over, at which judgment is rendered, and if it be possible by such proof, and the order of the court made thereon to uphold the judgment rendered in a case in which the process is lost, the present would therefore from the transcript brought up by the *certiorari* seem to be such a case.

Is it then competent in any case to supply the loss of process; and may the judgment notwithstanding such loss be upheld by proof afterwards made in the court of original jurisdiction and the order of the court thereon?

Those questions have, we apprehend, in effect been answered in the affirmative, by the former decisions and practice of this court.

Exhibits in chancery cause, which are lost or mislaid after the decree, may be supplied at a subsequent term.

In the case of Craig against Horine, 1 Bibb, 8, a question arose whether it was practicable, and if practicable, how it should be done, to supply the absence of certain exhibits which were necessary to make out the complainant's title, and which had been used on the trial in the court below, but which had been mislaid or lost out of the papers since the trial in that court, and not contained in the transcript of the record certified by the clerk.

The court after maturely deliberating on the consequences which might follow from any rule, which might be adopted, came to the determination that the absence of the exhibits might be supplied, but that it must be done by application to the court that tried the cause.

After the decision in that case by this court, application was made to the court of original jurisdiction in which the cause had been decided, to file the absent exhibits, and permission was accordingly given to the applicant to file them. The exhibits

were then brought up to this court by *certiorari*, and though objected to as not composing part of the record of the original cause, the objection was overruled, the admission of them by the court of original jurisdiction approved, and they were considered and acted upon by this court as part of the record in the case. 1 Bibb, 113. The same rule has since been followed and repeatedly acted on in subsequent cases.

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It is true no case has hitherto occurred in which it became necessary to decide on the application of the rule to lost process; but if it be correct to allow lost exhibits to be supplied, no reason is perceived why lost process may not also be supplied in the same manner. Exhibits which are with the papers of a chancery cause at the hearing, are as much a part of the record as any process can be; and if in respect to exhibits which are lost the defect of record may be supplied and corrected by after application to the court by whom the cause was decided, it would seem to follow that the defect in the record occasioned by the loss of process may also be supplied and corrected in the same way.

If, pending the writ of error with *supersedeas*, the defendant in error make sufficient proof of the existence and loss of the process and sheriff's return, the lack of which was the only error, the judgment will be affirmed with damages and costs.

It follows, therefore, that according to the record as it now appears from the return to the *certiorari*, that both of the Gentrys, who were defendants in the court below, were regularly served with process before judgment was rendered against them, and that the judgment must consequently be affirmed; and that too with cost and damages, as was done in the case of Speed's executors against Hann, 1 Mon. 16, upon affirming the judgment which had been superseded for an error apparent in the original transcript of the record, but which had been corrected after the cause was in this court by an amendment made in the court of original jurisdiction.

Turner and Caperton for plaintiffs; *Breck* for defendants.

CHANCERY.

Irvin vs. Divine.

Case 44. Appeal from the Montgomery circuit; S. W. ROBBINS, Judge.

Husband and wife. Survivorship. Executors and administrators. Descent. Hire and partition of slaves. Practice in chancery.

April 30. Judge MILLS delivered the opinion of the court.

Statement of the facts.

JOHN IRVIN died intestate, leaving personal estate and slaves. Administration of his estate was granted, and the personalty disposed of in payment of debts. About two years after his death, the present appellee married his daughter, and joined with the other heirs and widow in a bill to settle up the estate, with the administrators. The account was settled, including the hire of slaves, and a joint decree rendered in favour of the distributees. The wife of the appellee after this departed this life, and the appellee administered on her estate; and both as husband and administrator, he brought this bill for partition of the slaves, and account of their hire, against the administrators and remaining distributees. The defendants to the bill contend that the complainant is not entitled to any portion, but that by the death of his wife before possession, he has forfeited all, and that it goes to the remaining children and mother.

Decree of the circuit court.

The court decreed partition in his favor, and an account of hire, and that if the slaves were found indivisible, they should be sold and the proceeds divided; and the defendants below have appealed.

Interest of the wife in the slaves and personalty of her father, who died before her marriage, not reduced to possession during the coverture, passes on her death to her

We do not perceive any ground to doubt or question the right of the complainant, as administrator of his wife, to recover the share of his deceased wife. The interest of the wife was vested before the marriage. If she had survived, it would have remained to her, and could not have gone to the personal representatives of the husband, as the husband had never reduced it to possession during the coverture. But as he has survived, he can reduce it to possession by administering on the estate of the wife, and he cannot be compelled to distribute to others. On this point the law is too well and too long settled, to be now

questioned. It has been often recognized by this court, and to cite the authorities is deemed unnecessary.

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DIVINE.

We are referred to the cases of *Lyter vs. Rowton*, 1 Marsh. 518, and *Pinckard vs. Smith*, Lit. Sel. C. 331, with suggestions that the latter has overturned the former, and affects the right of the husband. We perceive no conflict between these two cases, on any point, which touches the right of the complainant here. In the former case, it is correctly held that the surviving husband can, as administrator, reduce into possession slaves or chattels which belonged to his wife before marriage, and not reduced to possession during coverture, and that he could not be compelled to distribute. In the latter it is said, if the right accrued during coverture, and was not reduced to possession during its continuance, the husband could take it as survivor, even without administration. Thus far these cases are consistent with each other, and corroborative of the opinion now expressed.

administrator, or on his death survives to her.

Where such interest accrues to the wife during the coverture, the right to recover the possession survives to the husband.

It is said *arguendo*, in the case of *Lyter vs. Rowton*, that the share of an infant in slaves and chattels, on his death during infancy, with collateral heirs only in existence, passed to the brothers and sisters, to the exclusion of the mother. This was a gratuitous assumption, a mere dictum, not necessary to be said in that controversy, as the case went off on another point, and its correctness in law is questioned in the case of *Pinckard vs. Smith*, where the point was directly in contest. But in no other instance is there any discrepancy between the two cases.

Shares of a child dying within age, in the slaves and chattels of his deceased father's estate, how they pass.

But the court below, in decreeing an account of hire, extended the account back to the date of the marriage of the complainant with his deceased wife. In this the court erred; because the previous decree settling this account during the marriage, is conclusive between the parties on this point, and cannot now be avoided. The complainant then recovered all the hire due, and the account now taken must commence at the point where the account in that case ended.

Decree between administrator and distributees, including the hire of the slaves, is conclusive in a subsequent bill for partition of the slaves, to stop the charge for the hire of the slaves at that date.

In another point the decree of the court below

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Slaves held in coparcenary may be sold by the order of the chancellor, where partition cannot be made; but the sale must be decreed by the court, not left with the commissioners to divide or sell, as they may judge.

cannot be supported. It directs the commissioners to divide the slaves, if practicable, and if impracticable, to sell them, and divide the proceeds. This is delegating to the commissioners the power of deciding upon the practicability of a partition and of directing a sale, which ought to be done by judicial authority, after the commissioners have reported the facts which obstruct partition, and their opinion thereon. Then the court ought to direct the sale, and the mode of executing it, if a sale must take place. That a court of chancery may direct a sale of slaves held in coparcenary, and divide the proceeds, where a partition in kind cannot be made, there is no room to doubt under the statutes of this country; but the determination of the question, and direction of the sale, belong to the court, and not to commissioners acting *en pais*.

In other respects we perceive no objection to the decree rendered.

Decree reversed with costs; and cause remanded, with directions for such proceedings and decree as shall conform to this opinion and the rules of equity.

Triplet for appellants; *Mayer* for appellee.

CHANCERY. *Lindley vs. Sharp &c. and Sharp vs. Lindley.*

Case 45.

Error to the Mühlenburg circuit; ALNEY McLEAN, Judge.

Usury. Mortgages. Parol evidence. Sales.

May 10.

Chief Justice BIBE delivered the Opinion of the Court.

Allegations
of Lindley's
bill.

JOHN LINDLEY, by his bill against Sharp, charges, that Sharp loaned him, in the year 1821, the sum of five hundred and thirty dollars; and as security for repayment thereof in a month, he executed to Sharp a deed for two hundred acres of land in Christian county; that very shortly after, at the instance of Sharp, he procured for Sharp a deed from Huling to Sharp, for a tract of land in Todd county, which was done and accepted by Sharp in satisfaction of the sum so borrowed; but as the land in Todd was worth about two thousand

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dollars, Sharp agreed that if Lindley would pay the money so borrowed, with twenty-five or thirty-three per cent. advance thereon, in three or four months, the defendant Sharp was to have surrendered the land in Todd; that accordingly, on the 14th Nov. 1821, he executed his note to Sharp for the money loaned, with the advance thereon, amounting to six hundred and fifty dollars; and that it was agreed that if this note was paid in three or four months, the said Sharp was to reconvey to Lindley the land in Todd, which he had caused Huling to convey; if not so paid, Sharp to keep the land in satisfaction of the note; that the complainant was not able to pay the note by the time stipulated; that Sharp by virtue of a judgment and execution upon said note, has caused the property of the complainant to be sold; that Daniel Gray became the purchaser, and gave bond to the sheriff, with Wm. Lindley as security; that Sharp has received from Gray three hundred dollars of the money upon that bond, and issued execution for the residue, and retains the land in Todd, and claims to hold it as his own. To this bill Gray and Wm. Lindley and Sharp are all made defendants, with injunction restraining Sharp from collecting the money yet unpaid on the sale bond. The prayer of the bill is, that Sharp be compelled to repay the money with interest so collected from Gray, and that the balance uncollected on that sale bond be paid over to the complainant, or that Sharp be compelled to surrender and reconvey to the complainant the tract of land in Todd county; or for such general and equitable relief as his case may require.

The history of the transaction, as given by Sharp's answer, is, that in 1821, Lindley's property being under execution upon some liability, from which Azariah Davis felt a deep concern to relieve Lindley, they, Davis and Lindley, applied to him to borrow money for Lindley, to relieve his property from execution. Sharp told them he had the money, but he had provided it with intention to purchase some negroes, and he would not part with it but for such negroes as suited his convenience. Davis agreed, if Sharp would advance to Lindley five hundred and thirty odd dollars, he (Davis) would, in a time then

Sharp's answer.

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agreed on, furnish the defendant Sharp with two negro girls, of the size and description of two then owned by A. M. Sharp. To secure the performance of this undertaking by Davis, and to procure the money, Lindley executed to Sharp a deed for two hundred acres of the land he lived on in Christian county, which deed was without any condition expressed in it. After the expiration of the time for Davis' performance, and after several indulgences, and a total failure to deliver the negroes, the defendant, Sharp, supposed he had an indefeasible title to the land conveyed by Lindley, and is advised he could have held it, but he had evinced no disposition to do so. That he was importuned to give up the deed for the two hundred acres in Christian, and take a deed for a tract of two hundred acres on Spring creek in Todd county, to be procured from Huling. Finally, he consented and agreed to an arrangement as follows: Lindley agreed to procure the deed to Sharp from Huling for the tract in Todd, and execute his note to Sharp for six hundred and fifty dollars; Davis agreed that such negroes as were to have been furnished, would then be worth one thousand dollars, as such property had risen in price; and that sum was to be paid to Sharp in consideration of the failure to deliver the negroes; the note of \$650 executed by Lindley to Sharp to be in part of the said \$1000; said Davis to pay the balance, or on failure, Sharp to hold or sell the land in Todd for the balance; and on his part Sharp agreed to release his title to the land in Christian. This agreement was made in the presence of Sharp, Davis and Lindley, and mutually understood; and accordingly, Lindley executed his note for \$650, and procured the deed to Sharp from Huling for the land in Todd. Sharp admits that he had often observed that the fulfilment of this contract was all he desired, and that Lindley might sell the land for that purpose. He states that he had given the patent to Lindley to sell the land to raise the money, and that he would convey to the purchaser; that Lindley had been offered \$500 for a part of it. He states that altho' he does intend to give to whomsoever shall be entitled, the benefit of the land or proceeds, after he is satisfied in his contract, yet "he is

advised that the court has no legal or equitable right to divest him of his vested right to said land; he states he holds it by an unconditional deed, duly recorded, and there was no express or implied understanding at the time or after, that the defendant should ever release the same; and all that ever was understood between this defendant and complainant, was the mere voluntary declaration of this defendant, that although he could hold said land, he has told the complainant and others, he did not mean to do so; and it is still the intention of this defendant to secure himself in the payment of the money aforesaid only. But as all these declarations were in parol only, and no writing whatever between them in relation to it, this defendant relies upon the statute of frauds to protect him against the interposition of the court to distort his legal right to said land, and prefers to hold the means, to save himself and do justice to the complainant, in his own power."

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He states, that at complainant's request, after several indulgences, he sued at law; "and the complainant being so well impressed with the justice of this defendant's demand, voluntarily came into court and entered his consent on record that an execution should immediately issue on said judgment." He admits the sale, under execution, and the purchase by Gray, and receipt of part of the money from Gray. The answer then denies that he agreed to receive the deed from Huling in satisfaction of the money advanced, and of the deed for the land in Christian, but repeats it was received upon the contract and agreement about the negroes, as before set forth.

The defendants, Gray and Wm. Lindley, admit their sale bond, and say they are willing and ready to pay to whomsoever the court shall award the money.

Gray and
Wm. Lind-
ley's answer.

The circuit court dissolved the injunction, with ten per cent. damages; and permitted the defendant Sharp to proceed to collect the money on the sale bond, but decreed that Sharp should convey to Lindley the tract of land in Todd, which the complainant had caused Huling to convey.

Decree of the
circuit court.

Lindley complains, that the decree did not go farther in relieving him from the usury.

Lindley's
complaint a-
gainst the
decree.

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Sharp's objections.

An advance of money to an applicant for a loan for his obligation to deliver slaves of a certain description in a certain time, worth more than the money, held to be a usurious loan.

Parol evidence is competent to prove a transaction in the form of an absolute sale, was a mortgage to secure a usurious loan.

Sharp complains, that he has been compelled to yield the land.

The answer of Sharp denies the legal deductions of the usurious loan, and reservation of usurious interest, for the forbearance which are drawn from the facts charged in the bill, but gives a more minute detail of all the facts; from which a more oppressive advantage and a more aggravated and exorbitant usury was evidently extorted from the necessities of the complainant than that charged in the bill. The first loan to relieve the complainant from the pressure of an execution upon his estate, was covered by an agreement that Davis, for the money, should furnish two negroes of certain sizes and descriptions; and to secure that contract, an absolute deed was taken from the complainant for the land in Christian. The negroes not having been furnished, Sharp held up his title to the land as absolute. The money was advanced by Sharp to Lindley in 1821—the month does not appear; but on the 14th November in the same year, this advance of five hundred and thirty odd dollars, as the answer says, (the proof says \$533,) was swelled by the devices of the contract to pay negroes instead of money, and the absolute deed for the Christian land, and by the rise in the price of such property, into an agreement to pay instead of the negroes, the sum of one thousand dollars. The negro girls might have increased fast, but this money was made to breed much faster.

To secure this sum however, and for redemption of his land so first conveyed by way of security, Lindley is made to execute his note for six hundred and fifty dollars, and to convey the land in Todd, of great value, by an absolute deed; and as Davis has not paid the balance of the sum of \$1000, Sharp claims the land in Todd for this balance of \$350. It is plain from the statements in the answer, that the money was loaned to Lindley by Sharp, the taking of the agreement for negroes, and the absolute deed for the Christian land, and then taking for redemption of that land and for the negroes, the sum of \$1000; part in a note for 650 dollars, the residue in Davis' promise; and to guard against his failure, an absolute deed for the Todd tract, are artifices

and devices too shallow to evade the statute. The defendant however relies upon the statute of frauds "to protect him from the interposition of the court"—"and is advised that the court has no legal or equitable right to divest him of his vested right to the said land"—because his deed is recorded and unconditional, and the transaction rests in parol proof. The defendant has been very badly advised. The cases of *Hammond vs. Alexander*, 1 Bibb, p. 333, *Fenwick vs. Radcliff's heirs*, 6 Monroe, 154, and *Grimes vs. Shrieve* at this term, 6 Monroe, 546, and the cases therein referred to, render any farther discussion of this case unnecessary. The defendant cannot escape the statute against usury.

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This court is of opinion that the facts admitted in the answer do in law amount to flagrant and enormous usury, and show that a very oppressive advantage has been taken of the distresses and necessities of the complainant; and that the decree of the circuit court has not gone far enough to relieve the complainant. This court is farther of opinion, that the order and decree dissolving the injunction with damages before final hearing, ought to be relieved against in its consequences; that an account ought to be taken, by a commissioner to be appointed, of the moneys which have been received by the defendant Sharp on the sale bond given by Gray and his surety, and upon the order and decree dissolving the injunction with damages, and of the balance of principal and legal interest due said defendant Sharp, from the time of the first advance, after deducting the monies by him received; that due regard be had to the kind and value of the money loaned, of that received, and of that due on the sale bond, the balance due Sharp up to the time of the decree to be made in this cause, ought to be decreed to said Sharp, to be paid out of the sale bond, and the surplus decreed to the complainant; and that the defendant Sharp be decreed to surrender and reconvey the said tract of land in Todd, which was conveyed to him by Huling, the deed to be with clause of special warranty against himself and his heirs, and all persons claiming or to claim under him; and that said Sharp be decreed to pay the costs at law

Opinion and
decree.

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and in chancery. It is therefore ordered and decreed that the said decree of the circuit court be reversed; and that the case be remanded to that court for further proceedings, according to the principles and directions expressed in the foregoing opinion, and for such orders and decrees as may consist with the said opinion, and the usages of courts of equity.

Sharp to pay the costs of both suits in this court.

Denny and Darby for Lindley; Mayes for Sharp &c.

PLEAS IN
THIS COURT.

Case 46.

Hopkins vs. Chambers &c.

Error to the Oldham Circuit; HENRY DAVIDGE, Judge.

Abatement. Writs of error. Non-residents. Bonds for costs. Pleading in this court.

May 3. Judge OWSLEY delivered the Opinion of the Court.

Case stated.

Upon calling this cause for trial at the present term the defendants appeared, and presented their plea in abatement, in which they allege that the plaintiff, at the time of suing out the writ of error, was, and still is a non-resident, and that no bond for the payment of cost has been executed by him, as is required by the act of assembly in such cases provided, and offered to file the same. To the filing of the plea, the plaintiff objected, because if admissible at any time, it should have been offered at the first court to which the cause stood on the docket for trial, and because several terms have elapsed since the process which issued against the defendants, was served upon them. Without waiting for a decision on the objection made to the filing of the plea it was agreed by the parties to submit the plea as on demurrer to the court, reserving however to the plaintiff the full benefit of his objection to the time of filing it, and also reserving to the plaintiff the rights of now executing bond for cost if in the opinion of the court it should be deemed competent for him to do so after plea by the defendants.

After the matter was pleaded by the defendant, we

should not have considered ourselves authorised by the offer of the plaintiff to execute bond for cost, to overrule the defence of the defendants if the plea had been tendered in due time.

The act of assembly which in explicit terms applies to all courts in this commonwealth, declares expressly that no suit shall be commenced in any court by a nonresident until he shall file in the clerk's office of such court, bond with sufficient security, who shall be a resident of this state, conditioned for the payment of all costs that may accrue in consequence thereof, either to the opposite party, or any of the officers of such court.

The act has not, it is true, pointed out the mode in which the failure to give the bond by one who at the commencement of the suit is a nonresident shall be taken advantage of by the adverse party, but it is undoubtedly matter in abatement of the suit only, and upon general principles is pleadable as such, and when pleaded cannot be avoided by matter *ex post facto*.

We know that the practice of the country has tolerated a different mode of taking advantage of the failure to give bond and security. The practice has been to allow the objection to be made by motion to the court, and we would not be understood as intending to disturb the practice long since approved and now firmly settled. The objection when taken by way of motion to the court, has also, by the practice of the country, been suffered to be obviated by the plaintiff afterwards giving bond and security, and in doing so the court may not be considered as abusing that reasonable and sound discretion which must at all times be exercised when deciding on such motions.

But without intending to disturb the practice which has obtained in that respect, we have no hesitation in saying that where there is a failure by the plaintiff who is a nonresident to give the bond required by the act the defendant is at liberty and has the undoubted legal right to plead the matter in abatement of the writ, provided he does so, in apt and due time, and after the matter is pleaded, there

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When a plea in abatement for the omission of the non-resident plaintiff to file a bond with surety for the costs, is filed, the tender of the bond afterwards will not avail.

The act requiring such bonds for costs, applies to this court.

Omission to file a bond for costs, pleadable in abatement.

Where the defendant makes his motion to dismiss the suit of the non-resident plaintiff for the omission to give bond for costs, the bond may be given afterwards—

Otherwise where the matter is pleaded in abatement.

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is left with the court, no discretion to permit the plaintiff to obviate the plea by the giving of bond, but it becomes the imperative duty of the court, to pronounce the sentence of the law by abating the suit.

Pleas for the lack of bonds for costs must be filed in this court at the first term to which the process is returned fully executed.

But we are not of opinion that the plea was tendered by the defendant in due time. The writ of error was issued in May 1824, and was returnable to the October term of this court thereafter. Process issued against the defendants in July of the same year, was made returnable also to the October term, and was actually served upon all of the defendants before the return day. The cause must therefore have stood for trial on the docket of this court at the October term 1824, and after the expiration of that term we apprehend no previous matter in abatement of the writ of error could be regularly pleaded. We would not be understood to say that there is any statutory provision expressly applicable to this court, which forbids defendant in error pleading matter in abatement after the first term, at which the cause stands for trial; but there is a provision in the act of the Legislature of this country concerning civil proceedings in courts of original jurisdiction, which limits the time of filing pleas in abatement to the day at which the cause is docketed for trial at the first term, and by analogy to the rule of law in those courts it would seem that there should not only be some limitation as to the time of pleading such matter in this court, but that the limit should not extend beyond the first term after process is served upon all the defendants in error. The plea of the defendant cannot therefore be allowed.

Denny for plaintiff; *Monroe* for defendant.

Hopkins vs. Chambers &c.

Same case on its merits.

**Executions. Replevin bonds. Limitations. Errors.
Costs.**

Judge OWSLEY, delivered the Opinion of the Court.

On the 30th of May 1820, there issued from the office of the Jefferson circuit court, a *feri facias* in favor of Hopkins, &c. against the estate of Chambers &c. for three thousand eight hundred and thirty one dollars and thirty one cents, besides interest and cost, directed to the sheriff of Jefferson county, returnable to the 12th of August, 1820. Upon this execution is the following endorsement: "Note, that either notes on the Bank of Kentucky or its branches, will be accepted in discharge of the whole of this execution." (Signed)

Worden Pope, Clk."

May 5.

Fieri facias.

The sheriff to whom the execution was delivered, levied it upon a tract of three hundred acres of land belonging to Campbell, one of the defendants therein named, and made a return thereon, that the land was not sold, for want of time to advertise according to law. Sheriff's return.

On the 6th of September 1820, there issued a *venditioni exponas* to the sheriff, commanding him to expose the land upon which the *fi. fa.* had been levied, to sale &c. *Ven. ex. endorsed for bank notes.*

This execution was also endorsed, "that notes on the bank of Kentucky or its branches will be taken in discharge thereof, (Signed) Worden Pope Clk." And it was also returned by the sheriff, "the property within named not sold, for want of bidders."

On the 29th of December 1820, another *venditioni exponas*, with like directions to the sheriff, issued from the same office, and upon which is the like endorsement as to bank paper. But there is also on this execution the following memorandum: "the sheriff, in the collection of this execution, will cause the same to be replevied two years, or the time prescribed by law, being unwilling to take Kentucky Bank notes in payment, (Signed) Wm. C. Barker & Co. Dec. 29, 1820." *Second ven. ex. endorsed by the clerk, that bank notes should be received, but by plaintiff that bank notes would not be taken.*

2 H

HOPKINS
vs.
CHAMBERS.

Sheriff's re-
turn replev-
ied for two
years.

Fieri facias
on replevin
bond.

Motion to
quash replev-
in bond, and
executions
issued there-
on.

Judgment of
the circuit
court.

Grounds for
the motion
stated in the
notice.

The sheriff's return upon this execution is in the following words: "Came to hand January 15th, 1821, and replevied; Levi Tyler security in the replevin bond, as per bond herewith will shew.

The replevy bond is dated the 15th of January, 1821, purports to be regularly executed by the defendants in the execution, with Tyler their security; and was payable within twenty four months from its date.

On the 14th of February 1823, there issued on this replevy bond a *fieri facias*, in favor of Barker and Hopkins, against the obligors named in the bond. The sheriff to whom it was directed levied the execution on several tracts of land, some of which were sold, and as to the residue, he returned that it was not sold for the want of bidders.

After this, several other successive executions, issued on the same replevy bond, each of which was levied on different property, but none of which was sold by the sheriff.

The obligors in the replevy bond and defendants in the executions which thereafter issued, at the March term 1824, of the Jefferson circuit court, in pursuance to notice given by them to Barker and Hopkins, moved the court, for reasons mentioned in the notice, to quash each and every execution which had issued, together with the replevy bond.

The trial of the motion was removed to the circuit court of Oldham, and judgment there rendered, quashing the replevy bond, and each of the executions which issued thereon.

To reverse that judgment, this writ of error is prosecuted by Hopkins, survivor of Barker and Hopkins.

The only objection taken in the notice to the replevy bond is, that it is in violation of those provisions of the constitution of the United States and of this State, which forbid the Legislature passing any law which impairs the obligation of contracts, and that the bond is therefore inoperative and void. Aware however that this objection could not ac-

According to the settled doctrine of this court, avail their clients who gave the bond, the counsel for the defendants in error made no effort in argument to sustain the judgment on the ground of any supposed violation of the constitution, either of this state or the United States.

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But it was contended by them, that after the plaintiffs in error, in whose favor the *fiery facias* issued on the 30th of May 1820, had endorsed the same, that notes on the bank of Kentucky, would be accepted in discharge thereof, and after that execution had been levied upon the estate of the defendants in the execution, they were not at liberty to withdraw the endorsement, but that it was incumbent upon the clerk to continue the endorsement upon the executions which thereafter issued in favor of the plaintiffs, and as the endorsement was in fact continued by the clerk upon each *condemnation exposita*, it was urged by the counsel for the defendants, that instead of obeying the directions given by the plaintiffs on the latter one, to cause the debt to be replevin two years, the sheriff in taking the replevin bond, should have made it conform to the act of assembly then in force, which required replevin bonds taken under executions endorsed for bank paper to be made payable within one year only, and hence it was insisted, that the bond as taken for twenty four months, is in violation of the law under which the sheriff acted, and was therefore correctly overturned and set aside by the judgment of the circuit court.

Grounds relied on in the argument here.

Were it even admitted, that in reversing a judgment quashing a replevin bond, it would in the general be competent to travel out of the objection to the bond relied on in the notice, and hunt out any other objections which may exist on the face of the proceedings under which the bond was taken, the objections so sought after, must undoubtedly be such as would have authorized the court of original jurisdiction to render the judgment complained of. Before the objections which were taken in argument to the bond are examined, therefore, it would seem to follow, that we should inquire whether or not if

Query, whether objections to a replevin bond, apparent in the record, but different from the grounds specified in the notice to quash, may be relied on here.

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they had been urged in the court below on the trial of the motion, they could have been regarded by that court.

Motion to quash a faulty replevin bond must be made at the term next succeeding the return day of the first execution issued on it.

This enquiry, though a necessary one, is attended with no difficulty. There is nothing in the nature of the objections which would have prevented an examination of them by the circuit court, if they had been taken by the defendants in due time; but if there be any thing in the objections, they only go to render the replevy bond a *faulty* one, and the motion of the defendants in that court came too late to quash a bond of that sort. The motion was not made to the first court after the first execution issued on the replevin bond, and unless made at that term of the court the act of assembly regulating such motions, expressly forbids the motion to be made afterwards, 2 Dig. 1258.

Were we therefore to concede to the defendants, that in taking the replevin bond for twenty four months, instead of one year, the sheriff acted out of the pale of his official duty, and that the bond is consequently faulty, still as the motion to quash was not made in proper time, the court below could not, for that irregularity, have correctly quashed the bond, nor can this court, for that cause, sustain the judgment which went to quash the bond.

But the judgment did not stop at quashing the bond, it went further and quashed each of the executions which issued thereon; and the object of the present writ of error is to reverse the judgment, quashing the executions, as well as that quashing the bond. The next question therefore is as to the correctness of the judgment in respect to the executions.

Assuming the bond to be a valid statutory replevin bond, there is no possible ground upon which the judgment as to the first execution that issued thereon can be sustained. That execution is in due form, and in every particular, conforms to the requisitions of the law under which it was issued.

Bond taken
by the proper

But it may be contended that, if in taking the bond for twenty four months, instead of two years,

the sheriff acted in violation of law, the bond, though not quashable in consequence of the lapse of time, is not entitled to the force of a statutory replevin bond, so as to authorize an execution to issue thereon; and it may be urged that, the first execution is therefore unsupported by any judgment or bond having the force of a judgment, and was correctly set aside by the judgment of the circuit court.

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officer, and having the characteristics of a replevin bond, payable at a period prescribed by law, for such bonds in any case, is a valid judgment bond till quashed, however palpably erroneous it may be in amount, or other respects.

The argument is certainly specious, and would carry with it great force, provided the bond bore upon its face the stamp of one not authorized to be taken by law. But such is not its character. By the provisions of the act of assembly of the 11th of February 1820, under which the sheriff must have acted, in taking the bond, there is a class of cases in which the sheriff is directed to take a replevy bond for two years, so that *prima facie* the bond upon its face is not without the authority of law, and until quashed or set aside, must be treated and acted on as a valid statutory bond. It would indeed be strange if such were not the case. Whether, when taken by the sheriff, a bond has the force of a judgment, has never been supposed to depend upon critical exactness. Though inaccuracies of the most palpable sort, be committed by the officer, and the bond be taken either for too much, or too little, its force and efficacy as a statutory replevin bond has nevertheless, always been understood to be the same, as if no error existed in the bond. It is to replevy bonds, that the law communicates the force of judgments, and it must be to the bond, and not to the conduct of the officer in taking it, that we should have recourse in ascertaining its efficacy. If it contains the characteristic stipulations of a replevin bond, and be payable at the time prescribed by law, for any description of replevy bonds to be made payable, though in taking it the officer may have erred in calculating the amount, or may have acted incorrectly in other respects, the bond is emphatically a replevin bond, and until quashed or set aside, must have ascribed to it the force of a judgment. Such we think must be the force of the bond in question. True, it is payable in twenty four months, and not in express terms, two years, but in common parlance,

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"Twenty-four months" in the time of the payment of a replevin bond is equivalent to the two years directed by the statute.

months are understood to be calendar months, and the expressions in the bond must be so construed.

Possessing, therefore, as it must be understood to do, the force of a judgment, the clerk did right in issuing the execution upon the bond; and as by the lapse of time no objection could, when this motion was made, be successfully urged against the bond; its force as a judgment must now be conclusive against any attempt to set aside the first execution on the ground of the bond being faulty.

Whether or not the objection which has been urged to the bond, could have availed the defendants to set it aside, if it had been made in due time, we have not thought it necessary to decide, because even if it could, the result as to this contest would be precisely the same.

Where a *feri facias* has been levied on land, and returned without a sale, no other *feri facias* can issue on a judgment till that land has been sold or released.

With respect to all the other executions which issued after the return of the first that issued on the replevin bond, we concur in the opinion of the circuit court, quashing them. The first execution on the bond was levied upon a tract of land which does not appear ever to have been sold, or released from the execution, and of course no other execution could regularly thereafter issue to take other estate of the defendants, whilst the land seized under the first, remained undisposed of, and subject to that execution.

Judgment reversed in part, and affirmed in part.

The judgment quashing the replevy bond, and the first execution which issued thereon, must therefore be reversed, and the residue of the judgment as to the other executions must be affirmed.

Costs.

The plaintiffs in error must recover cost in this court.

Denny for plaintiffs; *Haggin* and *Monroe* for defendants.

Freeman &c. vs. Brown.

CHANCERY.

Case 48.

Error to the Estill circuit court; GEO. SHANNON, Judge.

Pleading. Usury. Process. Absent defendants.

Judge MILLS, delivered the Opinion of the Court.

May 5.

The bill of the complainant is brought to scale a note, on which judgment at law is obtained, and payable in dollars, to a specie standard, on the ground that the note was given for paper of the bank of the commonwealth loaned to him, and was drawn, by fraud or mistake, payable in dollars, omitting to say that it was to be paid in paper.

The defendant admits the loan, and denies the fraud and mistake. The court below, scaled the demand and perpetuated the injunction for part of the demand.

It is sufficient, in a bill to be relieved against a bond for lawful money given for the nominal amount of depreciated notes, to allege the borrowing and lending, without averring the transaction was usurious: the court will apply the name and the law.

We conceive it immaterial, whether there was a fraud or mistake in drawing the note, or not. For if there was none, the transaction is clearly usurious by the defendants own shewing. In answer to this, it is said that this bill does not charge usury or rely upon it, and without expressly pleading it, no relief on that account can be given.

The complainant has charged a borrowing and lending, and a payment stipulated for beyond legal interest. The defendant admits these charges. The substance of usury is therefore relied on, and it is as easy for the chancellor to find out, and give it the proper name of usury, as it would be if the parties had used the name. The substance is that to which the chancellor looks. If the facts are in the pleadings, the chancellor will draw the proper conclusion of law.

The defendant insists that the money was due him, from a third person, and that in specie, and he had refused to take bank paper for the debt; that it was this specie debt which was loaned and the transaction only amounted to an exchange of securities: the complainant's note payable in specie, for this third person's note due in specie. In this the proof has failed. It is evident that although the money loaned to the complainant, was gotten from this third

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person, for a specie debt, yet it was taken by the defendant himself, and then left in the hands of a depository, to be loaned to the complainant on note and security given to the satisfaction of the defendant.

But the court below has erred in enjoining \$115 of the principal of the note with its interest, when, according to the proof, it ought to have been only \$105; and for this error the decree must be reversed.

Certificate of the publication against an absent defendant, must appear, by the certificate or otherwise, to have been made by the editor or publisher.

There is also, an irregularity in decreeing over against the defendant Freeman, in favor of his co-defendant, not only because the decree is for too much by the aforesaid ten dollars, for which the injunction was perpetuated beyond what it ought to have been; but also because the order of publication against the defendant Freeman, to answer the answer of his co-defendant, his assignee, is certified to have been inserted in the public paper by some person, who is not stated by himself, or proved in the record, to be the editor or publisher of the paper, and according to former decisions, such proof of publication is insufficient.

The decree is therefore reversed with costs, and cause remanded, with directions for such proceedings and decree as shall not be inconsistent with this opinion.

Turner for plaintiffs; *Breck* for defendant.

EJECTMENT.

Blight's lessee vs. Atwell & Co.

Case 49.

Error to the Hardin circuit; PAUL I. BOOKER, Judge.

Evidence. Practice. Error. Taxes. Forfeiture.

May 6.

Judge OWSELY delivered the Opinion of the Court.

Statement.

THIS writ of error is prosecuted to reverse a judgment rendered in favor of the defendants in error, on the trial of an ejectment, which was brought against them by the plaintiff in error, in the Meade circuit court.

By the notice attached to the declaration, the defendants, who were tenants in possession of the land,

were warned to appear and make themselves defendants at the September term, 1824. They accordingly appeared at that term, entered into the common rule, caused themselves to be made defendants, and pleaded the general issue.

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The suit was afterwards moved, by change of venue, to the circuit court of Hardin; and at the March term, 1825, of the Hardin court, the following entry was made upon the order book, to-wit: "At this day came the defendants in this cause, and say that they rely on the further facts, that the lessor in said cause has not listed for taxation, nor have the taxes been paid on the land claimed by the plaintiff in said suit."

At the June term, 1826, the issue made up by the parties was tried by a jury, and after various instructions were given and refused, a verdict in conformity with the judgment rendered by the court, was found for the defendants.

The title claimed by the plaintiff is derived in the following manner:—

Under a patent from the State of Virginia for one hundred and thirteen thousand four hundred and eighty-two acres, to Banks and Claibourne, dated in 1785:

The deed of the patentees, Banks and Claibourne, to Delormerie, dated in 1799, and the deed of Delormerie to the lessor, Blight, dated 1809.

The original deed of Banks and Claibourne to Delormerie, was not produced on the trial in the circuit court; but without objections to its competency, a copy of a copy of that deed was used in evidence, and all the questions which were made by the defendants and decided by that court, seem to have been predicated upon the admission by the defendants, that by the evidence introduced and used before the jury, the plaintiff had shown a conveyance of the title from the state of Virginia, down to the lessor, Blight.

Where there is no objection made, the copy of a copy of the deed read in evidence has the same effect as the original.

A different course, has however, been taken in argument by the counsel of the defendants in this court.

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It is contended by him that the writ of error has brought the whole of the proceedings before the court; and as it appears that the copy of a copy of the deed from Banks and Claibourne to Delormerie, and not the original deed, was the only evidence produced by the plaintiff to prove a conveyance of the title from Banks and Claibourne, it was argued that the court must perceive that the plaintiff failed to prove title in the lessor, Blight, by the best and only competent evidence; and hence it is insisted, that from the whole record it is apparent that the plaintiff showed no right to recover, and that judgment should consequently be rendered against him in this court.

Were it true that from the record the title is shown not to be in Blight, there would be some plausibility in the argument urged by the counsel for the defendants. The writ of error has no doubt brought the whole record before the court, and it would seem to be doing a vain and useless thing to reverse the judgment and remand the cause to the court below for further proceedings, if from the face of the record, the plaintiff was shewn to have no title to the land in contest, and could not, therefore, succeed in recovering judgment. But the record shows no such case. It shews that to prove title in the plaintiff, evidence not of the highest dignity, but of inferior grade was used on the trial, but it was used without objection on the part of the defendants, and they may have failed to raise any objection to the evidence, not because they supposed that if used, the evidence would be of no avail to the plaintiff, but because they may have been convinced that if objections were made to the competency of the evidence, the objections, might and would be obviated by other evidence in the power of the plaintiff. It would, therefore, not only be palpably unjust, but contrary to the settled course of adjudications in this court, to allow objections for the first time to be taken in this court to the competency of evidence used on the trial in the court below, and to pronounce judgment against an unsuccessful plaintiff in the court below, because he has not proved title by the best possible evidence.

With these remarks we will leave the argument used by the counsel of the defendants in this court, and proceed to notice the questions raised by the assignment of errors.

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It appears from the copy used in evidence by the plaintiff, that the deed from Banks and Claibourne to Delormerie, was not recorded or lodged in the proper office to be recorded, in the time prescribed by law to make it valid against creditors or subsequent purchasers, without notice; and on the trial in the circuit court, an effort was made, on the part of the defendants, to defeat the plaintiff's title, by proving, that since the date of their deed to Delormerie, Banks and Claibourne have conveyed the same land to Thomas Lewis.

Prior unrecorded deed is valid against all except purchasers and creditors, and their privies. Hence a defendant in ejectment cannot read a subsequent deed to show title out of the lessor, without showing he holds under it.

The deed from Banks and Claibourne to Lewis was used in evidence, but whether or not before he received the deed, Lewis had notice of the deed which had been previously made by them to Delormerie, was not expressly proved, nor was there any evidence conducing to prove that the defendants held the land under Lewis by contract or otherwise.

The court instructed the jury that the title of the land passed to Lewis by the deed which was made to him from Banks and Claibourne, if before or at the time of receiving that deed, Lewis had no notice of the deed to Delormerie, and that it was incumbent on the plaintiff to prove that Lewis had notice.

In thus permitting the title derived by the lessor of the plaintiff, under the prior deed of Banks and Claibourne to Delormerie, to be assailed through the instrumentality of the subsequent deed from Banks and Claibourne to Lewis, we think the court most clearly erred. Though not recorded within the time prescribed by law, the deed to Delormerie is not absolutely and utterly void to all intents and purposes. It is inoperative as to the creditors and purchasers of the vendors without notice, and it may be so as to others holding in privity under them; but with respect to the rest of the world, the omission to record the deed in due time, forms no objection

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to its validity and sufficiency to pass the title to the vendee.

It would therefore seem to follow, that none other except such as to whom the deed is inoperative, can be allowed to object to the deed and draw in question its validity, on the ground of its not having been recorded. There is no possible reason for permitting a stranger to the deed to object to its validity, that would not apply with equal force in favor of a stranger, whose interest is not affected by a fraudulent deed, taking advantage of the fraud; and it has been repeatedly held, both by the courts of England and this country, in the exposition of the statutes against fraudulent conveyances, that to enable a person to draw in question the validity of a deed alleged to be fraudulent, he must show himself to be either a creditor or purchaser, as to whom such deeds are declared by the statutes to be void.

The court below should not therefore have suffered the defendants, without shewing themselves to hold in privity of Lewis, to attack the validity of the deed to Delormerie, on the ground of its not having been recorded in proper time.

Effect of the
Register's
sale and
deed.

An effort was also made at the trial, to defeat the plaintiff's right to recover, by the defendant's introducing as evidence a deed made by the register of the land office to Charles Helm, in 1809. That deed purports to have been made under a sale of the land for taxes, describes a boundary conforming with that contained in the deed to Delormerie, and including upwards of twenty thousand acres. There is some uncertainty as to the precise quantity of acres actually sold by the Register, and in pursuance of which sale the deed was intended to be made. It became however a question of some consequence, to ascertain the true quantity of acres sold, in the case of Blight's heirs against Banks &c. at the last term of this court, and it was there decided not to exceed nineteen hundred acres; and without again travelling over the ground then explored, to prove that to be the quantity of acres sold, we would refer to the opinion then delivered, to prove its correctness: See 6 Monroe. The validity of the

deed made by the Register was also a question then contested, and without expressing an opinion, whether or not it passed the title for the nineteen hundred acres thereon directed to be laid off, it was decided not to be of any validity for the residue of the land contained in its boundary. We may therefore, without further remarks upon that deed, with propriety refer to the opinion in that case, as being conclusive as to every material point growing out of the deed in this case. For the land now in contest appears not to be included within the nineteen hundred acres sold by the Register, and as the Register's deed has been decided not to have conveyed the title to any part of the residue of the tract, it is evident that no obstacle is presented to the plaintiff's right to recover, by any thing contained in that deed.

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Several other questions were made and decided in the court below, but they seem all to resolve themselves into the enquiry, whether or not it was incumbent on the plaintiff to prove on the trial in that court, that in all past time the taxes due to the State on the land had been actually paid by Blight, and those through whom he derived title.

If such proof was necessary to be made, it must have become so by force of the ninth section of the act of assembly of this State, which was approved the 12th of January, 1825, after the commencement of the plaintiff's action. Before the date of that act, there was no law which, according to any fair interpretation, can have required the production of such evidence, and none which would even have tolerated an inquiry into matter so impertinent and irrelevant to the issue. By the ninth section of that act, it is however provided:

The 9th sec. of the act of Jan. 1825, allowing the defendant in ejectment to put in issue, that the taxes have not been paid on the land, applies to cases in the federal and not to the state courts.

"That upon the trial of every cause, either at law or in chancery, now depending or hereafter to be commenced in any of the courts of the United States, for the recovery of the possession or seizin of any land in this State, the defendant or defendants shall have the liberty to put in issue the fact that the taxes have not been paid on said land, to a period at least within one year of the time of trial; and upon

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the court or jury, according to the tribunal which shall try the fact, finding that the taxes have not been paid as above stated, the said land then in suit, so far as respects the title of the plaintiff, demandant or complainant, shall, that instant, be forfeited and vested in this State, absolutely and unconditionally, without any further finding."

Now it is evident that this section of the act, has no application to trials in the circuit courts of this State. It is to suits which were or might thereafter be depending in the *courts of the United States*, and not to courts of this State, that the section in express terms applies. The circuit courts of this State are not, either in fact or law, courts of the United States. They derive their existence and power from State authority, and are emphatically *courts of the State*, and not courts of the United States. It would therefore be in direct violation of the explicit language of the section, were we by construction to extend it to, and make it embrace, courts of this State. Such a construction cannot be adopted by this court.

The court below therefore erred in giving to the act a different construction.

It follows, that the judgment of the circuit court must be reversed with cost, the cause remanded to that court, and further proceedings there had, not inconsistent with this opinion.

Talbot, Denny, Mayes, and Darby for plaintiffs;
Bledsoe for defendants.

CHANCERY.

Young & c. vs. Wiseman.

Case 50.

Appeal from the Fayette Circuit; JESSE BLEDSOE, Judge.

Mortgagors. Bar by adverse possession. Limitation. Slaves.

May 7.

Judge MILLS delivered the opinion of the court.

Statement of
the facts.

About the last of May, 1815, John D. Young bought of the executors of Hezekiah Harrison, two slaves for \$700, and gave his note for the price, with William D. Young as surety, payable

in one or two months. At the time of payment John D. Young failed, and William D. Young his surety then agreed to take the slaves from John, and to pay their price. He accordingly did so, and John D. Young made him a bill of sale absolutely, warranting the title to the slaves against all persons except Robert Wickliffe, to whom John D. Young had executed a mortgage for about the sum of four hundred dollars; and he took possession of the slaves, and paid off and discharged the mortgage of Wickliffe, and continued to hold them undisturbed for about seven years.

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Wiseman, the appellant, then filed this bill, setting up against these slaves, a mortgage executed to him by John D. Young, dated after the mortgage to Wickliffe, and before the date of the sale to William D. Young, and praying a foreclosure and sale of the slaves.

Wiseman's
bill.

Besides other grounds of defence which need not be noticed, William D. Young sets out his bill of sale from John D. Young with warranty against all but Wickliffe, whose claim he has extinguished. He denies notice or knowledge of the mortgage of the complainant, insists on his adverse possession, and pleads and relies on the statute of limitations to bar the recovery.

Young's an-
swer.

The court below took an account of the hire of the slaves while William D. Young held them, and having ascertained that the hire exceeded the amount of Wickliffe's mortgage, refused to allow to William D. Young, the amount of the original purchase money, and decreed a foreclosure of the equity of redemption and a sale of the slaves. From this decree William D. Young has appealed.

The most important question is, what effect is the statute of limitations to have? It was held in Virginia, *Ross vs. Newell*, 1 Wash. 14, that the statute of limitations of five years did not apply between mortgagor and mortgagee of slaves, and that twenty years was necessary. But this is on account of the trust existing between the parties; and it is admitted in the same case, that although the statute will not

Vendee of the
mortgagor of
slaves, unin-
formed of the
mortgage,
holding ad-
verse to his
hep for five
years, is pro-
tected by the

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bar against
the mortga-
gor's action
at law, or
bill, to en-
force his lien.

run between trustee and *cestuique trust*, it nevertheless will do so, between the trustee and strangers. And in the case of *Harrison vs. Harrison*, 1 Call. 428, it is expressly held that the statute will run against the trustee in favor of disseizors and tort feisors holding adversely to both.

The rule is also well settled by Chancellor Kent, in *Kane vs. Bloodgood*, 7 John. Ch. Rep. 90, and *Roasevelt vs. Mark*, 6 John. Chy. Rep. 266, that time does not run, in the case of mere technical trusts, the creatures of a court of equity. But where the trust is constructive only, or is cognizable at law as well as equity, the statute can in general be pleaded, either in equity or at law, where there has been an actual possession. The condition of the mortgage of the complainant was forfeited more than five years when he brought his bill. If William D. Young had gotten this property by tort, or trespass, there is no doubt he could protect himself by the lien of five years. Why then should he be in a worse situation when he has come by it honestly and innocently. He was driven into a purchase by the failure of John D. Young, his principal, to pay the price, and had to give the additional price of Wickliffe's mortgage. Had he known of the mortgage of the complainant, and been assured that he must lift that also, he never could, acting with ordinary prudence, have been willing to have bought the slaves. To pay their price, and then both mortgages, would have been worse than losing the price altogether. The presumption is therefore strong in favor of his answer, that he did not know of the mortgage in question, and he took the slaves, holding them adversely against all except Wickliffe. If he had taken these slaves by violence, the statute would have shielded him; if he has been deluded into the purchase by the mortgagor, ignorantly, and innocently, the statute will protect him.

That the
mortgage had
been duly re-
corded, does
not affect the
case.

It is true the mortgage of the complainant has been recorded. But this, although it may force upon William D. Young constructive notice, so that the title he acquired could not be good without the statute in his favor, yet this constructive notice does

not prevent the operation of the statute, provided the possession is such as the law calls adverse.

YOUNG & Co.

vs.

WISSEMAN.

We therefore conceive that the statute is a bar in equity, as it would have been at law, if this was a legal action.

The decree of the court below is therefore reversed, with costs, and the cause remanded with directions to dismiss the bill with costs.

Crittenden and Wickliffe for appellant; *Chinn* for appellee.

Castleman vs. Combs &c.

EJECTMENT.

Error to the Henry Circuit; HENRY DAVIDGE, Judge.

Case 51.

Statutes. Sales of lands in adversary possession. Practice in chancery. Sales pendente lite.

Judge MILLS delivered the opinion of the court.

May 7.

Jonah Combs sold to John Castleman about two hundred acres of land, and gave his bond for a conveyance on the 26th of October, 1818. Combs had held possession of the land from the year 1793, having taken it under a Mr Webb, but how Webb claimed it, does not appear. John Bowman, during the possession of Combs, and before the sale to Castleman, brought his ejectment, and recovered a judgment against Combs for the land, and Combs then bought of Bowman, and took his bond to convey the title when the purchase money was paid. This bond of Bowman, Combs also assigned to Castleman, when he sold to him, in addition to giving his own bond to convey, and Combs placed Castleman in possession of the land, and he made improvements thereon.

Statement of the facts.

Castleman brought his bill in equity to get credits on the purchase money, which he claimed against Combs, and also for a specific performance of the contract, against both Combs and Bowman, and amended his bill, praying a rescission of the contract. The circuit court set aside the contract, decreed Combs to restore the purchase money, and pay for

Rescission of the contract, and surrender of possession.

CASTLEMAN
vs.
COMBS & CO.

Case formerly
here referred
to.

improvements, and Castleman to pay rents and restore the possession. Castleman and Combs both acquiesced in this decree, and Castleman in obedience thereto restored the possession to Combs.

But Bowman and others, who were assignors of the notes given by Castleman to Combs for the purchase money for the land, were dissatisfied with the decree, and a writ of error was sued out, in the name of all the defendants, to reverse it. This court reversed the decree, and directed the contract to be enforced, as will be seen by the reported case in 4 Lit. Rep. 303, to which we refer for a more accurate and circumstantial history of this case.

On the return of the opinion and mandate of this court to the court below, some further proceedings were had and a final decree entered, which will be hereafter noticed.

Castleman being thus compelled by the decree of this court to abide by the contract, and pay for the land, wished the possession again restored to him, as he was indubitably entitled to it, on the decree affirming the contract.

But he did not find Combs as ready to restore the possession in conformity to the opinion of this court, as Castleman had been in obedience to the decree of the court below. For Combs, about one month after the decree of this court was rendered, had conveyed seventy-six acres of the land to William Combs and John B. Hancock, being the most valuable part including the improvements, and although William had previously lived with Jonah, yet he entered after this deed in a new character, as he contends in proof in this cause, and that Jonah abdicated his authority as lord of the soil, in favor of William, who now became family ruler; and although Jonah was first master of the family, and William the boarder, or guest, now William becomes master, and Jonah the guest, and William professes under his deed to hold absolutely and adversely against the world.

Castleman's Castleman having paid up to Bowman the purchase money, which Jonah Combs was bound to pay;

and holding the assignment of Bowman's bond to Jonah Combs, received from the executors of John Bowman (he having departed this life and authorized his executors by will to convey the estate,) a conveyance of the land, and brought this action of ejectment against both Jonah and William Combs and Hancock for the land.

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vs.
COMBS &c.

evidence of
title.

On the trial he gave in evidence Bowman's patent, his conveyance from Bowman's executors, the record of the aforesaid chancery suit between the parties, including all the writings which had passed between them, as well as the different decrees which had been rendered.

The defendants gave in evidence the long possession of Jonah Combs, with a patent in the name of John May, and some conveyances to Jonah Combs by others professing to hold under May, the conveyance to William Combs and Hancock, and the professed adverse possession of the two latter.

Combs'
grounds of
defence.

The court below, at the instance of the defendant's counsel, instructed the jury—"that if they believed from the evidence that the defendant William Combs was in the possession of the seventy-six acres contained in the deed of Jonah Combs to said William Combs and Hancock, and of no other part of the land embraced by the patent of Bowman, before and at the date of the deed of conveyance from the executors of Bowman to the lessor of the plaintiff, and that said William held adversely to the claim of said Jonah and all others, the said deed from the executors to the lessor did not pass to him such title as to enable him to maintain this action against said William Combs."

Instructions
of the circuit
court.

Under this instruction the jury found for the defendants, and judgment was rendered accordingly. Castleman excepted to the opinion of the court, and has brought this question before us by writ of error.

Verdict and
judgment for
defendants.

As the deed of Jonah Combs to William Combs is dated the second day of January, 1824, and the deed from the executors of Bowman to Castleman, the lessor of the plaintiff, is dated the 18th of March, 1825, and the act of assembly entitled "An act to re-

Instruction
on the act
against the
sale of land
in the ad-
verse posses-
sion of others.

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vive and amend the champerty and maintenance law, and more effectually to secure the *bona fide* occupants of land within this commonwealth,"—Session acts of 1823, p. 443 was passed on the 7th January, 1824, and took effect on the 1st of July, 1824, we have no doubt that the motion made, and the instruction given by the court, was intended to bring the case of the lessor of the plaintiff within the purview of that act, and to destroy the effect of his title in consequence thereof. The first section of that act provides "that no person shall sell or purchase by deed of conveyance, or bond, or executory contract, any pretended title or right to land, of which any other person than such vendor or vendee shall, at the time of such sale or purchase, have possession adverse to the right or title so sold or purchased, and every deed, conveyance bond, or contract, made, executed or entered into, in violation of this section, shall be void; and no right of action shall accrue to either party under such deed, conveyance, bond, or contract."

Act prohibiting the sale of land in adverse possession, does not apply when the occupant holds in such manner that he is bound to surrender the possession to the vendee without questioning his title.

Allowing the defendants below, or either of them, the benefit of or shelter from this act, or to protect themselves by it as a shield in this action, is so repugnant to the moral sense of all who are conversant with the history of the transaction, that we should hesitate long before we should permit it. We cannot consent to dress up William Combs, with all his boasted independence of tenure, or his cotenant Hancock, or his former landlord, but now humble guest, Jonah, in the habiliments, of an adverse possession, within the meaning of the act. Indeed, to do so, would be highly indecorous to the legislative branch of the government, and would convict them of the intention of weaving a covering for stratagem, cunning and fraud, which is utterly inadmissible. We cannot presume that the legislature intended to dissolve the strong ties of contracts, or the equitable or legal relations which then might, or hereafter may exist between parties, relative to the possession of land, and especially those relations or rights of possession which were, or shall be, fixed and settled by the judicial tribunals. We might as well say, that every tenant for years, might, in viola-

tion of his lease, attorn to a new landlord, or acquire a new title, and then declare independence of his landlord and thus become an adverse possessor; or that every vendor possessing the land, and bound to perform his contract by paying the money and accepting a title, and every vendor bound to give up possession and convey the land to his vendee, might acquire a new title, or convey his title to another, who should proclaim adverse possession, as to suppose, that Jonah Combs, or any person holding under him, could do so in this action. We have no doubt, that all their different relations with regard to title, are left between contracting parties, since the act, in the same situation in which they were before; and wherever there is such privity of estate between two, that one is looking to the other for a conveyance or possession, under a solemn contract or the adjudication of a court of competent jurisdiction, their relation is not affected, and that the statute is designed to embrace the case of claimants on one side and possessors on the other, of strangers in estate, or such possessors as can, without violating the principles of law or conscience, hold adversely to the claimant, who holds a title for the land.

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COMBS &c.

By attending to the case of Jonah Combs, it will be found that he has not one feature of an adverse possessor to Castleman. We have not thought it necessary to look with a critical eye into the title of Castleman, derived from Bowman's executors. Whatever that title may be, we know it was derived through Jonah Combs, and that Jonah Combs was bound, both by his contract and the decree of this court not only to allow Castleman the title of Bowman, but also his own conveyance, carrying with it every other title he might hold; and as he had taken the possession back from Castleman, in compliance with the first decree, he became bound on the reversal of that decree, and a decree enforcing the contract, to restore back that possession and account for the profits. Indeed it might be plausibly contended that Jonah Combs ought to be estopped to question Castleman's title, or gain say his right, of possession, by analogy to the principle recognized

Where, after the decree of the circuit court, rescinding the contract, the vendee was in possession, surrenders to the vendor, when that decree is reversed here, and the contract affirmed, the vendee is entitled to restoration.

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by this court, that a vendee of land who had taken possession from the vendor, and then has recovered from that vendor his purchase money back, cannot be permitted to question his vendor's title in an ejectment to regain the possession by the vendor. But it is not necessary that we should decide this point, as Castleman appears to have title derived through Jonah Combs, and to have the strongest claims to the possession, both in law and conscience, sanctioned by a decree of this court.

In such case, on the return of the cause to the circuit court, the chancellor ought to have the possession restored, and the matter of rents &c. all settled as a part of the original cause—not send the parties to law to finish the chancery suit.

We cannot but regret that the case of the lessor of the plaintiff in the chancery suit, after the return of the decree of this court to the court below, has been so badly managed, as to give rise to this suit, and produce so much delay and expense attending it. In that case, we dismissed Bowman and Smith and T. & W. Smith the assignees of Combs from the cause. We also laid down the principles on which the accounts of Castleman and Jonah Combs were to be settled, leaving the court below, by the ordinary usages of courts of equity, to take this account—to ascertain whether any thing remained due of the purchase money from Castleman to Combs—and to provide for its payment, and to decree Castleman a title as his original bill required. It was also competent for that court, to inquire into the possession *ad interim*, to take an account of the mesne profits, and to place the possession where it ought to be. For all these purposes that cause was open, and on all these points the chancellor should have acted without contravening the decree or opinion of this court. If these points had been taken up and acted upon by the chancellor, he would have set this matter right, at once, and have cut off the necessity of this action at law. Instead of this, that court, after dismissing Bowman and Smith and T. & W. Smith, proceeded, between Castleman and Jonah Combs, to decree that if the balance was this way or that, then such and such decree should be made, adopting the directory language of this court in settling the principles of the account, for a certain decree after the account was settled, and then gave to Castleman his costs, and stopped short of giving him the title or possession, to both of which he was en-

titled; and as Jonah Combs, or his assignees, were receiving the interest on the purchase money, so Castleman was entitled to the profits of the land. From this defect in the decree of the chancellor, this cause has arisen. But one thing is evident, that nothing which has been done by the chancellor in that cause, or omitted to be done, has released Jonah Combs from the indisputable obligations under which he lies, both in law and conscience, to restore to Castleman the possession of this land, which he got from him under an erroneous decree, the reversal of which bound him to give it back.

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COMBS & C.

Having ascertained the situation of Jonah Combs, and shown that he has no shelter from the act of assembly on which he relies, we will attend more particularly to the case of William Combs and Hancock, and ascertain whether they are in a better situation.

Case of Wil-
liam Combs.

We cannot help perceiving some symptoms of fraud in the title which they set up, and entertaining some suspicions that their deed of conveyance was executed to defeat the decree of this court, or the decree which the court below was bound to render in pursuance of the mandate from this. Before that conveyance, Jonah Combs had been holding the possession securely, as he had received it from Castleman under the decree of the court below. Then, he was master and owner, and William Combs his boarder. During this quiet period, the decree of this court was announced, on the 1st of December, 1823, reversing the decree of the court below, and carrying some alarm to his peaceful abode. The consequence, which must follow, was a loss of his home, by a restoration of it to Castleman, to whom he had sold it. It presented the enquiry, how was this event to be avoided. Within about one month afterwards, he conveys to William Combs and Hancock, who, at the same time, become not only the owners of the land, but of every thing else which he possessed. The tables are turned. Jonah Combs resigns the reins of government, and William Combs, the late subject, becomes ruler, and Jonah steps down to the degree of a mere family subject, liable to be turned out when his new landlord pleases; but

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notwithstanding this sudden change, harmony seems still to prevail in the habitation, and the parties, in their new relation, seem to move on with as little inconvenience as before, and no one but Castleman is left to feel any disagreeable consequences from this revolution in the former order of things.

But as an enquiry into this matter was precluded by the decision of the court below, and there is no express proof, but only presumptive evidence, that William Combs and Hancock actually knew of the decree of this court, and entered into a combination with Jonah Combs to avoid it, we will not enquire further into this matter, and will leave it open for further enquiry, if necessary, on a new trial in the court below.

And we will now take it for granted, that there was no actual fraud, and that both William Combs and Hancock acted innocently and fairly in their purchase from Jonah; still we shall see that their conveyance under which they claim, is void and cannot operate in the slightest degree to the prejudice of Castleman.

Conveyance by the vendor, who had received the possession after a decree of the circuit court rescinding the sale made before the entry of the mandate of this court reversing the decree and affirming the sale, is a transaction *pendente lite*, and does not affect the vendor's right to the possession.

It was a conveyance *pendente lite*, and is affected with all the consequences of such a deed. The decree of this court opened afresh the controversy between Castleman and Jonah Combs, and directed it to progress, and inevitably fixed the principles on which it should be decided. It was therefore *lis pendens et florens*—in proper vigor and of the most dangerous character. It not only told all purchasers that there was a controversy, but also disclosed how the contest must end—that Castleman must get the land and possession. The rule that a purchaser, under such circumstances, must be affected and can take nothing by his deed, is so well known, that it is unnecessary now to dwell upon it. It has been ably investigated and elucidated by Chancellor Kent in *Murray vs. Ballou*, 1 John. Chy. Rep. 566; *Murray vs. Leburne*, 2 John. Chy. Rep. 441; *Murray vs. Finister*, *ibid.* 155; *Heatty vs. Finley*, *ibid.* 158; *Green vs. Slater*, 4 John. Chy. Rep. 38. It is a case where the maxim *caveat emptor* emphatically and effectually applies. It is a stub-

born, iron rule, absolutely necessary to the due administration of justice. For without it, controversies could never end, and courts could never give the relief that justice and equity required. It would be only for a failing litigant to place the subject matter of the contest into the hands of another by sale, and then the controversy must begin anew, and when that was about closing, another transfer would again revive it, and so on in succession, till remedy by suit would only mock the pursuer. It could never have been the intention of the legislature, in the act, on which the dependents rely, to destroy this rule of the utmost necessity, and to allow a purchaser of this character, to assert his independence and proclaim adverse possession, and thus to defeat forever a plaintiff in the recovery of his just and conscientious demands.

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The judgment of the court below is, therefore, deemed erroneous.

It must be reversed with costs, the verdict be set aside, and the cause be remanded for new proceedings not inconsistent with this opinion.

Crittenden for plaintiff; *Monroe* for defendants.

Wood vs. F. & M. Bank of Lexington, and others. CHANCERY.

Appeal from the Nelson Circuit; PAUL I. BOOKER, Judge. Case 52.

Bills of Exchange. Statutes. Damages.

Chief Justice BIER delivered the Opinion of the Court.

May 8.

Nathaniel B. Wood, a resident of this State, drew a bill of exchange for \$5,000, payable, one hundred and twenty days after date, to the order of Martin H. & Nathaniel Wickliffe, dated at Bardstown, on the first day of Dec. 1819, and addressed to Mr. James I. Wood, New Orleans. This bill being endorsed by M. H. & N. Wickliffe, and Philip Reed, was purchased of the drawer by the Farmers' & Mechanicks' Bank of Lexington, and protested when at maturity, because, upon search,

Bill of exchange.

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vs.
F. & M. BANK
OF LEX. & Co.

Note given
for the bill.

the drawee could not be found, and no person would pay.

In consideration of this bill and protest, the drawer and endorsers executed their joint and several note to the Bank, dated 15th May, 1820, for \$5623 74, payable ninety days after date. This note was not paid when due.

Suit on the
note and the
claim assign-
ed to Wick-
liffe.

On the 6th Dec. 1820, the Bank received and credited on the note, the sum of \$1,500. It was afterwards put in suit, and pending this suit the President, Directors & Co. by a writing on a separate paper, assigned this note to Robert Wickliffe, reciting that credit, and the pendency of the suit, authorizing said Wickliffe to prosecute, direct, and control the suit in their name, but at his costs; to use all legal means to recover the sum due, deducting the credit. The said Wickliffe received the transfer "of said note and suit on the responsibility of the drawers, and without recourse to the said President, Directors, and Company."

Judgment for
plaintiff a-
gainst Wood.

Judgment was obtained on behalf of the corporation, Wickliffe issued execution, with credit for \$1,500, paid to the Bank; also, for \$1,125 as paid on the 15th May, 1823.

Bill of Wood
claiming
credits, and
to be relieved
against dam-
ages on the
bill, included
in the note.

In July, 1823, Nathaniel B. Wood exhibited his bill for relief, claiming a credit for \$2,200, paid to Nathaniel Wickliffe on the 5th February, 1823, instead of the credit of \$1,125, as of the 15th May. He alleges that N. Wickliffe was, by letter from said Robert Wickliffe, authorized to apply for and receive the money; and he exhibits the receipt of said N. Wickliffe for \$2,200, of the date of the 5th February, 1823, expressing the money was received for Robert Wickliffe; claiming also, a credit for ten per cent and interest thereon, improperly included in the note for damages of protest, of \$500, and interest thereon, when no damages were chargeable by law on said bill. For these two credits, so claimed, he obtained an injunction. Afterwards, by supplemental bill, he claimed an additional credit for \$75.

Decree of the
circuit court.

The circuit judge allowed the credit of \$2,200, of the 5th Feb. 1823, instead of that of \$1,125 as given,

but rejected the others, and dissolved the injunction in part, with damages. From this decree Wood appealed.

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vs.
F. & M. BANK
OF LEX. &c.

The credit of \$2,200, in place of that of \$1,125, was properly allowed. That Nathaniel Wickliffe was authorized by his brother Robert to receive the money of Wood, is established as well by the proof as by the answer. The letter to Nathaniel, charged in the bill, is admitted by the answer: the authority was unconditional. The receipt of Nathaniel Wickliffe is proved by the subscribing witness; it is for \$2,200, "in part of the amount due Robert Wickliffe." The language of the receipt is too plain to be misunderstood.

Credit for the
\$2200 allowed.

The credit for \$75 was properly rejected. The claim rests upon proof, that at the time of the transaction for which the receipt was given, Wood paid to Nathaniel, on account of Robert Wickliffe, twelve hundred dollars in money, and two bonds amounting to \$1075; this sum of \$75 is claimed as not included in the receipt of the 5th February. But the same attesting witness to the receipt proves, that those notes, by indorsement, were to be discharged by \$1000, if paid when due, which was expected, and therefore they were paid, and accepted and receipted for, at \$1000.

Claim of the
credit for
\$75 disal-
lowed.

The proof is explicit, that for years before and since the date of the bill of exchange, the drawee, J. I. Wood, has resided in the county of Shelby in this state. Hence it is argued, that no damages are due upon the bill, because it was drawn upon a resident of this state, and not upon a person out of the state. The statute which was then in force, and not repealed until the 10th of January, 1820, (although in the Digest, by mistake, the repealing law is stated to have been enacted in 1819, see 1 Dig. chap. XXX, sec. 5, p. 194,) is thus expressed: "If any person or persons shall draw or endorse any bill or bills of exchange, upon any person or persons out of this state, on any other person or persons within any other of the United States of North America, and the same being returned back unpaid, with a legal protest, the drawer thereof, and all oth-

A bill of ex-
changedrawn
in Ky. and
addressed
Mr. J. I. W.
N. Orleans, is
a bill drawn
upon a per-
son out of
this state,
within the
meaning of
the 5th sec.
of the act of
1798, and
damages
were recover-
able on it.

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OF LEX. &c.

ers concerned, shall pay the contents of said bill or bills, together with legal interest from the time the said bill or bills were protested, the charges of protest, and ten pounds per cent. advance for the damages thereof." This statute does not speak of a person residing out of this state. The expression relates to a bill "upon any person or persons out of this state," within any other of the United States. The bill in question was drawn on "Mr. James I. Wood, New Orleans." Upon the face of the bill it is drawn upon a person as of New Orleans; and every person reading the bill, would expect that J. I. Wood would be found in New Orleans, to answer to the bill when presented for acceptance or payment. Of consequence, it is a bill drawn upon a person out of this state, within the meaning of the statute.

Otherwise
held in Hop-
kins vs. Clay,
3 Mar. 448,
where by pre-
vious agree-
ment, the bill
was accepted
by Hopkins
in Kentucky,
where he re-
sided.

The counsel for Wood has cited the case of Hopkins vs. Clay, 3 Marsh. 488, and insists, that according to the principle settled in that case, no damages are due upon this bill. Upon that case it is worthy of remark, that the bills were drawn upon, and accepted by, Hopkins, in this state; the sale under the decree of the court was made here; Hopkins purchased at the sale, and instead of a note, as required by the direction to the commissioner, the bills were drawn by the agent of the complainant in the suit, upon Hopkins, the purchaser, then in Kentucky, residing here, and the bills were accepted here, although by their terms made payable in Baltimore. Whether those bills did, or did not, shew upon their face, that Hopkins was of Kentucky, by being so addressed to him, although made payable in Baltimore, does not certainly appear from the report of the case; but it does appear that these bills were drawn and accepted in Kentucky, by a previous arrangement between Clay, the drawer, and Hopkins, the drawee and acceptor, and the whole business was transacted in Kentucky; so that no presumption could have been indulged, nor any belief created by the transaction, that Hopkins was of Baltimore when the bill was drawn upon him, and accepted by him. It was a case between drawer, who must have known the drawee and his place of abode, and this same drawee, who accepted at the very time of the drawing.

Therefore, the court declared that those bills did not come within the letter of the statutes of 1793 and 1798; "for the bills in question were drawn upon Hopkins, who was within this state;" and that the circumstance of their being payable in Baltimore did not bring them within the statute.

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OF LEK. &c.

These differences between the bills in the case of Clay and Hopkins, and the bill in question, are deemed sufficient, by Judges Owsley and Mills, to take this bill out of the principle of the decision in Hopkins vs. Clay; therefore, that the damages were properly due, and charged upon this bill. The Chief Justice concurs in allowing damages upon the bill, because, according to his understanding, a bill drawn expressly for payment at a particular place, or addressed to a person at a particular place, is a bill drawn on that place, and if that place be without this state, it is a bill drawn upon a person out of this state, in the mercantile sense and style; and within the predicaments of the statute. By the opinion of the whole court, the Bank had a right to the damages charged; therefore, the complainant is not entitled to the credit claimed on that account.

Distinction
in the cases,
held material
by justices
Owsley and
Mills, not by
the chief justice.

It seems to this court, that there is no error in the decree of the circuit court. It is, therefore, ordered and decreed, that the decree be affirmed with costs, and damages on the damages given upon dissolution.

Appellee to have his costs.

Denny and Rudd, for appellant; Wickliffe, for appellee.

Elizabeth Glenn vs. Eleanor Glenn, ex'x. and devisee of John Glenn, dec. CHANCERY.

Appeal from the Bullitt Circuit; PAUL I. BOOKER, Judge.

Case 53.

Husband and wife. Alimony. Devise. Election.

Chief Justice BRIDGES delivered the Opinion of the Court.

May 8.

In 1822, Elizabeth Glenn, the widow of John Glenn, deceased, exhibited her bill, against

Bill of Elizabeth Glenn.

GLENN
 vs.
 GLENN, ex'x.

Eleanor Glenn, executrix and sole devisee of John Glenn, against Silas Burks, and against the heirs of Polly Hill, who was afterward Polly Childress; and against R. O. Childress the husband of said Polly:

1st. For Alimony.

2nd. To set up, and establish and pursue, her rights and consequences under this writing.

Deed of gift.

"North Carolina, Rockingham county: To all people to whom these presents may come. I John Glenn, jun. of county aforesaid, send greeting: Know ye, that I the said John Glenn, for and in consideration of the natural love and affection which I have and bear unto my step daughter, Polly Hill, and divers good causes and considerations, me hereunto moving, have given, granted, and by these presents do give and grant unto the said Polly Hill, her heirs and assigns forever, the following negroes, to-wit: Thomas, Dolly, Easter, Edmond and Fanny, together with their future increase; but to be under the express proviso, and condition, that my wife Elizabeth and myself, have and keep the said negroes in our peaceable possession during our natural lives. In Witness whereof, I have hereunto set my hand and seal this—day of January, anno domini, 1800.

(Signed)

John Glenn, (Seal.)"

"Signed, sealed, and delivered, in the presence of

Thos. Henderson.

A. Henderson."

3rdly. For her distributive share of the slaves and personal estate as widow of said Glenn.

Facts of the case.

It appears that said John Glenn, married the complainant, then a widow, in North Carolina, shortly before the date of the instrument of writing; the slaves therein mentioned were the property of said Elizabeth, before the marriage; the husband was possessed of them in North Carolina, and abandoned his wife about the year 1811, and came to Kentucky, bringing with him the slaves or some of them; about the year 1813, he married the defendant Eleanor, and died in 1821, having first devised his whole estate to his second wife, and appointed her sole ex-

ecutrix. She obtained letters of probate in Bullitt county, in this State, wherein he died.

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Answer of the
defendant.

The executrix resists the claim under the deed; relies on the statute of limitations, and also a verdict and judgment in detinue in her favor at the suit of the said Elizabeth, founded on said bill of sale. Finding that complainant was the wife of said Glenn, the executrix put in her claim as a creditor for money which Glenn received of her after the marriage, in Kentucky, and for services of herself and children by her former husband, yet claiming as sole devisee.

Burks had purchased two of the slaves of Glenn, in his lifetime. The court dismissed the bill as to Burks; entered an interlocutor, by which the claims, for alimony and under the deed of gift were rejected; admitted the claim of the widow, (the complainant) for her share of the slaves of which Glenn died possessed, and of his personal estate after payment of debts; admitted the executrix to come in as creditor for the money which the testator had received belonging to her; rejected the claim for the services of herself and children, and appointed a commissioner to state and report the accounts according to the principles of the decree; from this the complainant with the assent of the defendant appealed, and by consent the suit was dismissed as to the husband and heirs of Polly Childress, without prejudice to their claims.

Decree of the
circuit court.

The claim for alimony was properly rejected. A bill after the death of the husband, for alimony from the time of abandonment to her husband's death, is a new species of suit, without precedent, and against the principles upon which a suit for alimony is sustained.

Suit for alimony not maintainable after the husband's death.

The writing from the husband made in North Carolina is of such singular character, that it has produced much perplexity. Judge Mills is of opinion, that it ought to be supported in equity, as good *inter partes*, even if it were ineffectual at law; that the step-daughter was a trustee for the use of Glenn and wife during their joint lives, and for the survi-

Effect of the husband's deed of gift to the step-daughter, of slaves acquired by the marriage, reserving an es-

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tate to the
grantor and
his wife for
their lives, in
a case be-
tween widow
and hus-
band's devi-
sec.

vor during life; that as the property was of the estate of the wife before her marriage, and the intent of the deed was to provide for her in case she survived, the consideration is such as to merit the countenance and support of a court of equity. Judge Owsley is of opinion, that the wife of the grantor, can take nothing by it, even if it were good as to the grantee Polly, after the determination of the two lives. The Chief Justice is of opinion, that after the dismissal of the bill by consent as to the representatives of Polly Hill, and after the trial in detinue, fully and fairly had upon the merits, the complainant is concluded and barred from setting up any claim under that deed: the bill being for the only two slaves demanded by the action of detinue relied on by the answer: therefore, that no opinion on the deed of gift is called for. The result of these opinions is, that the complainant can have no relief or benefit from her claim against the executrix by force of that deed.

The claims of the executrix for services of herself and children were properly disallowed. The circumstances under which those services were rendered repel any implied assumpsit by Glenn to pay for them otherwise than by the support and maintenance which they did actually receive.

Judges Mills and Owsley are of opinion, that the decree is correct in admitting the claim of Eleanor, as a creditor, to the amount of the money which the testator received after his marriage with her; that the marriage being void she is at liberty to reclaim her money, which he received as supposed husband; that she is at liberty to protect the share devised to her from being lessened, by asserting her claim as creditor in common with other claimants upon that fund; that she is not bound, to yield her claim as creditor because she is executrix and residuary devisee, nor to elect whether she will claim as creditor or legatee, any more than another creditor would have been if made executor and residuary devisee.

Dissent of the Chief Justice. The Chief Justice is of opinion that, from the length of time which has elapsed since that money

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was received, the circumstances under which it was received, the co-habitation of the parties, and the devise to her of his whole estate, real and personal, the utmost which a court of equity ought to permit the said Eleanor to do, is, to make her election to abandon the devise to her in consideration of the void marriage, and come in as creditor, or yield her claims as creditor and take as devisee. If she is permitted to come in as creditor, it is by courtesy, not as of strict right. The circumstances under which Glenn was permitted to receive and use the money, the manner in which the parties lived together, would seem to negative the idea of any assumption or debt from him to her. It is true, the marriage is void in law, (except as to the issue of such second marriage living the first wife, the issue being legitimated by our statute,) and thus one of the considerations upon which the said Eleanor permitted Glenn to use her money has failed. But the devise to her is as wife, in consideration of the said marriage, and their intercourse. The testator so calls her in his will and in the devise to her. He received the money of the defendant Eleanor as husband, and compensated it by support of her and the devise to her as wife. She ought not to be permitted to claim under the will as wife and devisee in consideration thereof, and also in opposition to it as no wife, and therefore, as creditor by indulgence and courtesy. By the devise to Eleanor, she is placed by Glenn, the double husband, in a better condition than that of the lawful wife. It ill accords with the principles of equity to suffer Eleanor, the second wife, after having done the first wife the greatest injury, as appropriator of the person, affections and property of her husband, to inflict farther loss by lessening the lawful share of the lawful wife, by her double claim as creditor and residuary devisee. It seems to me that the devise to Eleanor ought to be taken as made in satisfaction to her for that portion of money and property which she carried to Glenn: taking all the circumstances connected with the devise to her as wife, so called in the will, and I cannot doubt that the devise was superinduced by the property he had received and the connex-

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ion which had existed between them as man and wife; that connexion existed in fact until dissolved by death, and the will is the consequence and sequel of it.

The dismissal of the bill as to Burks, the purchaser from Glenn, is approved by the whole court.

Decree.

CERTIFICATE.—This cause came on to be heard on the transcript of the bill, answers, exhibits, depositions, and proofs, and the arguments of counsel of both parties; whereupon, differences of opinion arose among the judges upon some of the questions in the case, the result of which, is, that the decree of the circuit court is to be affirmed. It is, therefore, ordered and decreed, that the said decree of the circuit court be affirmed, and that the cause be remanded to that court, for the purpose of proceeding to a final decree according to the principles of said interlocutor, and for such other and further proceedings as are conformable to the usages and principles of courts of equity.

Appellee to be paid her costs in this court.

Denny and Mayes for appellant; *Crittenden* for appellee.

DEBT OR
CASE.

Commissioners of the Christian Bank vs. Greenfield.

Case 54.

Appeal from the Christian Circuit; BENJ. SHACKELFORD, Judge.

Variance between writ and declaration.

June 6.

Chief Justice BIBB, delivered the opinion of the Court.

Variance between writ, in case, and declaration in debt, is fatal on demurrer.

THE writ is in case, damage \$200; the declaration is in debt, for \$480, upon a note executed in Oct. 1819, to the President, Directors & Co. of the Christian Bank, by Greenfield.

The defendant demurred, and the court sustained the demurrer.

The case does not come within the statutes of *jeo-fails*; it is decided upon demurrer: there has been no verdict of twelve men; nor judgment by *nihil dicet*,

MAY, 1828.

or *non sum informatus*, or enquiry of damages. The variance between the writ and declaration is so t and fatal as to justify the decision of the court in favour of the demurrant, without going into the other questions presented by the record.

VS.
GREENFIELD

Judgment affirmed with costs.

Crittenden for appellant; *Mayes* for appellee.

Hutchison's adm'r and heirs vs. Sinclair. CHANCERY.

Error to the Scott Circuit; JESSE BLEDSOE, Judge.

Case 55.

Evidence. Conveyances. Certiorari. Pleading in Chancery. Interrogatories. Severance. Practice in this Court.

Judge MILLS delivered the opinion of the court.

June 6.

THIS bill, filed by Sinclair, states that he and James G. Hutchison were joint purchasers of a tract of land, stated in this record, sometimes at 112 acres, and in other parts 108 acres; and that they received from their vendors, the heirs of Henderson, a joint conveyance; that the price was \$2,000, and of this sum Hutchison paid \$1,322, and the complainant only \$878, which left the complainant in debt to Hutchison the amount of \$322. That Sinclair sold his moiety in the land, and conveyed it to Hutchison, at the price of \$30 per acre, and the \$322 was to be a part of the payment or consideration, after it was lessened by some other accounts and demands due from Hutchison to Sinclair, which demands are specified in the bill. That Hutchison has died insolvent, or nearly so, except as to the land; that he made a nuncupative will, and disposed of the land, first to his wife for life, then to her offspring, with which she was supposed *enceinte*, and if there was no offspring, to his brothers and sisters. That his father and his widow had administered on his personal estate, and paid it away in discharge of debts. That Hutchison, in his life time, had sold a part of the land to a certain Solomon Crumbaugh, and that since the death of Hutchison, cred-

Allegations
of Sinclair's
bill.

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itors had obtained judgments against his administrators, and his father as heir at law, and had sold by execution all the lands, except a small portion which is held by his widow as dower. The purchase from Hutchison in his life, and the several purchasers under executions, as well as the administrators and widow, the brother and sisters, are made defendants, and a prayer annexed that the lien for the purchase money, may be enforced against the land so sold. There was neither bond or note given by Hutchison to Sinclair the complainant.

Answer of
the Hutchi-
sons.

The administrators answered the bill separately, both contesting the right of the complainant to any relief.

Answer of the
purchaser of
the land.

All the brothers and sisters of James G. Hutchison, whose interest depends on the nuncupative will, are silent; and as to them, the bill is taken as confessed, except Mrs. Lowry, who is a sister provided for in the will. But she does not, in her answer, take the character of a devisee under the will, but as a creditor; for it was by virtue of an execution in her name, as executrix of her husband, that the land was sold, and she became the purchaser, and re-sold it to other purchasers, who appear and contest the complainant's right to relief.

Decree of the
circuit court.

The court below settled the account between the parties, and decreed a considerable sum in favor of the complainant, and directed a sale of the land in discharge thereof. To reverse this decree, the defendants below have prosecuted this writ of error.

Various questions are made by the assignment of error; and some of them respect the interest of the defendants themselves. They dispute rank among each other. There is a purchaser from the decedent, the tenant in dower, and the creditors or purchasers under them all, who contend that the part held by them ought to be privileged. We will first examine the complainant's right to any relief under the circumstances of the case.

Acknowledg-
ment, in a
deed of the

He is aware that his claim on the face of his deed, is against him *prima facie*; and he charges that the sum for which he sold his moiety is greater than his

conveyance to Hutchison expresses it; and he admits that the deed expresses a payment, or acknowledges the consideration paid; all which imposed upon him the *onus probandi*, especially as he had not any counter writing, but rests on the assumpsit of the intestate, Hutchison.

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receipt of the
consideration
money, is but
prima facie
evidence of
the fact, and
may be dis-
proved by the
grantor.

As he had no writing evidencing the debt, and the conveyance of the land expresses the consideration paid, according to his own statement, he might be well aware that there was some difficulty in his road. It is true, that the receipt of the money, acknowledged on the face of the deed might be only *prima facie* and not conclusive evidence, of payment. But it imposed upon the complainant, the necessity of producing clear proof, that there was a balance due. This deed, however, is not in the record. It seems to have been there during the progress of the cause in the court below.

The commissioner appointed to settle the accounts, uses it, and descants upon its effect. So strong is the evidence that this deed is part of the record, that, if its production tended to affirm the decree of the court below, we should have no hesitation in sending a *certiorari* for it *ex officio*. But as it is a rule of practice in the court, not to award a *certiorari*, *ex officio*, where the part of the record absent has a tendency to reverse the decree or judgment of the court below, and the party here, who seeks to reverse this decree, has chosen to risque the trial without its production; we shall accordingly decide the cause without the deed, knowing, if it was here, that it could not aid the unsuccessful party.

This court
will award a
certiorari
where the
part of the
record absent
may tend to
affirm the de-
cision, and in
such case
only.

Without, therefore, enquiring whether the complainant here could or could not be allowed to prove a greater consideration than his deed expresses, and taking his case to be, as his bill expresses it, a case where the burden of proof lies on him, we find one difficulty in the road of the complainant, which we are not able to remove, in attempting to sustain this decree; and that arises in the pleadings.

Where the
defendant al-
leges a fact
which must
necessarily
be within
complain-
ant's know-
ledge, and
calls on him
by interroga-
tory to an-
swer to it,

The answer of the decedant's father, as one of the administrators and heir at law, insists that the

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and complainant evades it in his response, the fact shall be considered admitted, and cannot be disproved by evidence.

conveyance rightly expresses a payment; that James G. Hutchison really paid to Henderson's heirs the whole price in the original purchase; and that the complainant failed to pay any; and that it was in discharge of this demand, and for this cause, the complainant conveyed to Hutchison. This answer, he makes a cross bill, and appeals to the oath of the complainant to say; whether this be, or be not, the fact. To this charge the complainant makes no reply, although he has answered other allegations in this answer. This he evades, and the point to which he is called to respond, touches facts which must be within his own knowledge; and his silence on them must, of course, operate against him, and that conclusively; or so much so, that he cannot be allowed to introduce evidence to prove the fact otherwise than his admission makes it to be, so long as that admission stands. To do so, would be permitting his proof to overturn what his own acts had settled against him.

That such fact had been denied by the complainant in his bill, and his bill framed on that ground, does not alter the case—he must answer on oath.

The answer given to this argument, by the counsel for the complainant, is, that the bill charges the consideration money not to be paid, and that the answer on this point, is only responsive, and raises no new matter and refers it to the oath of the complainant, and that the act of assembly which allows an answer to contain interrogatories to the complainant, only permits new matter to be thus asked and answered, of course the silence of the complainant on this point in the answer, which more properly responds to the bill, ought not to prejudice him.

We are unwilling to give the statute so limited a construction. The bill of the complainant here, is not sworn to, and the defendant had a right to question every fact contained in the bill, and to appeal to the oath of the complainant for the truth thereof. If the complainant sees cause to evade an answer, where the subject matter must, from its nature, rest in his own knowledge, his bill cannot aid him; and the fact must be taken as against the bill, and he be precluded from proving the contrary. The testimony adduced conducing to show that the payment was not made, is not of the most satisfactory kind,

if it could be heard; but whatever its merits may be, it must be disregarded in the consideration of the case.

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It is however insisted, that this difficulty rests on the answer of Hutchison, the father, and a failure to reply thereto, and that before the hearing of the cause, he has refused to prosecute the writ of error, and has been severed, and of course he cannot be benefited by this state of the pleadings being in his favor and against his adversary. We might concede, that if this point operated in his favor alone, we should not feel disposed to reverse the decree, for the purpose of granting him relief, which he refuses to receive. But he is an administrator, and, with the widow of the decedant, the proper representative of the personal estate. The decedant died childless, and he, as the father, is the heir at law, and properly represents the realty; and as the nuncupative will cannot pass the land, the legal title is in him, till divested. Under him, the defendants, holding as creditors, claim title, as his title as heir has been sold under execution. His severance cannot therefore prejudice the interest of others, with whom he fails to prosecute. Their interest must be decided, in all respects, as if he had not been severed. He, who is severed, may get clear of costs, or may jeopardize his own interest; but he cannot affect the interest of others by the severance. That remains as if he was still a party, and the reversal will be as obligatory as if he had continued. Every fact, therefore, which the administrator who has been severed, has made appear to the prejudice of the complainant and benefit of others, must still operate to the benefit of these others concerned.

The fact being admitted by the complainant's silence, that the payment has been made, there is no lien, and consequently the decree must be reversed with costs, and the cause be remanded, with directions to dismiss the bill with costs.

Chinn for plaintiffs; *Lyle* and *Depew* for defendant.

In the suit of alienor against administrator, widow, heirs and purchasers of alienee, to subject the land for the purchase money, the effect of the evasion by complainant of an allegation and interrogatories put by adm'r, is not diminished by adm'r's refusal to prosecute in this court, to reverse the decree against himself and others.

COVENANT.

Owens vs. Holliday.

Case 56.

Error to the Clarke Circuit; GEO. SHANNON, Judge.

Bank note contracts. Evidence. Judicial notice. Judgment. Interest. Amendment. Error.

June 6.

Judge OWSLEY delivered the Opinion of the Court.

Declaration on a covenant for bank notes, dated in 1823.

HOLLIDAY sued Owens, in covenant, and declared on a note, dated the 3rd of March, 1823, for one hundred dollars in commonwealth's Bank paper, payable the first of January thereafter.

Endorsement for bank notes.

Upon the declaration Holliday endorsed that he was willing to accept, in discharge of the judgment to be rendered, either notes on the bank of the commonwealth, or notes on the Bank of Kentucky, or any of its Branches.

Verdict for damages equal to principal and interest, and judgment for money.

Owens failed to appear to the action, and an enquiry of damages was awarded by the court. One hundred and eighteen dollars and fifty cents, damages, were assessed by the jury; and judgment was thereupon rendered by the court, "that Holliday recover of Owens the damages aforesaid, by the jurors in their verdict aforesaid assessed, and also his cost, by him about his suit in this behalf expended."

No question of law appears to have been made on the trial in the circuit court, nor was there any application for a new trial.

In case of covenant for bank notes, within the act authorizing the recovery in kind, the judgment ought to be but for the nominal amount to be discharged in the bank paper.

The assignment of errors is predicated upon the supposition, that this is one of those cases which came within the act of the Legislature of this country, authorizing the recovery of bank paper specifically, and goes to question the correctness of the judgment, in not conforming to the provisions of that act.

There is evidently no conformity between the judgment required to be rendered by the act, and that which was entered in this case, either in the amount, or in the thing by which the judgment is to be discharged. This judgment is not for the precise nominal amount of the note sued on, nor is it entered to be discharged in notes of the bank; and by the directions of the act, the judgment is not only required to be entered for the nominal amount

of the note, but moreover, that amount is required to be entered in the judgment, to be discharged in bank paper.

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Were the present case admitted to be one, therefore, that comes within the provisions of the act, we should have no hesitation in saying, that the judgment could not be sustained. But is not understood to be such a case. The note sued on bears date prior to the passage of the act, and the act has heretofore been construed not to apply to contracts made before its passage.

Endorsement of the declaration by the plaintiff, that the bank paper would be received, does not empower the court to render judgment for the paper in kind, in a case not within the statute.

Uncontrolled by the act, the judgment was correctly rendered without regard to bank paper. It could not, in fact, have been regularly entered to be discharged in bank paper. It required the exertion of Legislative power to authorize judgment to be rendered for bank paper in any case, and it is only in cases to which the act of the Legislature applies, that judgment can now be rendered in that commodity.

The damages, it is true, are greater than the nominal amount of the note sued on, and as men, we may know that the paper of the bank has never been equal in value to gold or silver. But there appears to have been no objections to the assessment of damages made by the jury in the circuit court, and after being acquiesced in there by the parties, it is not for us, *ex officio*, to take notice of the value of bank paper, and overturn the verdict and judgment because the jury has placed too high an estimate on the paper.

This court cannot, *ex officio*, notice, that damages equal to principal and interest, on a covenant for bank paper, dated before the act allowing the recovery in kind, are excessive.

But there appears, from a return made by the clerk of the court below, to a *certiorari* which went from this court, that at a term subsequent to rendering the original judgment, and since the cause has been in this court, an amendment has been made to the judgment by that court, so as to make it dischargeable in bank paper; and it becomes necessary to decide, whether any, and if any, what effect that amendment is to have upon the original judgment?

An attempt, at a subsequent term, to amend a judgment rightly rendered for specie, so as to make it for bank paper, is nought.

We have said that the judgment has been amended, but we have so said because it is so denominated

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by the court below, and not because it can, with strict propriety, be said to be an amendment. To amend, is to correct that which is erroneous, and needs correction; but to make that which is already correct erroneous, cannot with any propriety be said to be an amendment; and we have seen that the judgment, as originally rendered, was correct, and that the attempt to amend it was only calculated to make the judgment illegal and invalid. Such an effort is not to be indulged, and though allowed in the court below, cannot prevail in this court, so as to produce any effect on the judgment, as originally rendered.

The judgment is, therefore, affirmed with, cost and damages.

Hanson for plaintiff; *French* for defendant.

APPEAL TO
THE CIR. C.
Case 57.

Semple vs. Morrison.

Appeal from the Jefferson Circuit; HENRY PIRTLE, Judge.

Appeals in the circuit courts. Set off. Infants. Void and Voidable. Assignments.

June 6.

Judge OWSELEY, delivered the Opinion of the Court.

Warrant by
Morrison vs.
Semple.

MORRISON sued out, from a justice of the peace of Jefferson county, a warrant against Semple, on the following assigned note:

"Due Richard Taylor, Jun. twenty-five dollars, ninety-four cents, specie, for surveying two thousand acres of land below Tennessee river, for the heirs of John W. Semple, dec'd, June 24th, 1826.

J. Semple."

I assign the within note to Moses Morrison, for value received. *Richard Taylor, jun.*

Set off relied
on in defence.

The warrant was defended by Semple, and the following endorsed note set up and relied on by way of set off:—

"For value rec'd, I promise and oblige myself, my heirs, &c. to pay, or cause to be paid, unto Richard Taylor, Sen. his heirs or assigns, the just and

full sum of two hundred and twenty-five dollars, **SEMPLE**
current money of Kentucky, on or before the fif-
teenth day of May, 1821; as witness my hand this
first day of Dec. 1820. *Richard Taylor, jun."* **VS.**
MORRISON.

"The above note I give to my grand-daughter, Ma-
tilda Fontaine, as witness my hand, this 7th of Dec.
1824. *Richard Taylor, Sen."*

"For value rec'd, I assign the within note to
James Semple. *For Matilda Fontaine;*
John Nelson."

The justice gave judgment, on the trial of the
warrant, against Morrison's right to recover; but
Semple not being satisfied with the judgment, and
entertaining the opinion that it should have went
further, and awarded to him the residue of the
note, set up by way of offset, appealed to the circuit
court. Judgment of the justice
against Mor-
rison, and ap-
peal by Sem-
ple.

Being informed by Semple, that the contest was
settled, the circuit court made an order dismissing
the appeal; but at a subsequent day of the same
term, the order of dismission was set aside on the
motion of Morrison. Appeal dis-
missed on
Semple's mo-
tion, and
reinstated on
Morrison's.

The first question is, as to the propriety of the
court setting aside the order of dismission

The setting aside the dismission was opposed by
Semple, and it is now contended by him, that he
had a right to dismiss his own appeal, and that af-
ter it was dismissed, the court possessed no power
in opposition to his wishes to reinstate it.

This court, however, entertains a different opin-
ion. By the act regulating appeals from the judg-
ments of justices to the circuit court, they are to be
tried upon the merits, as though no trial had been
previously had thereon; and notwithstanding the
appeal was prayed by Semple, we apprehend he was
not at liberty to defeat a trial on the merits by dis-
missing the appeal, or, by opposing a reinstatement
of the appeal, after it was improperly dismissed,
prevent an investigation of the merits, and
thereby defeat Morrison in the recovery of whatev-
er he might, on a fair trial of the merits, prove him-
Appellant in
the circuit
court, who
was defend-
ant before the
justice, can-
not dismiss
the appeal at
his pleasure,
but the ap-
pellee may
have a trial
on the merits.

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self to be entitled to. Whether the appeal be prayed by the plaintiff or defendant in the warrant, it is to be tried in the circuit court on the merits, and on such trial the judgment should be either for the plaintiff or defendant, as the merits turn out to be, regardless of the decision of the justice. The merits may be as fairly reached, and justice as fully attained, on the trial of an appeal taken by the defendant in the warrant, as if prayed by the plaintiff; and to require of the plaintiff, if dissatisfied with the judgment, to pray an appeal after one is taken by the defendant, would, without conducing to any useful or beneficial result, only tend to the multiplication of suits, and the accumulation of unnecessary cost to the parties.

It was not, therefore, incorrect in the circuit court, after being informed that the contest was not settled, to set aside the order which it had been induced to make, dismissing the appeal, under the erroneous impression that a settlement had taken place.

Set off relied
on.

A jury was empannelled and sworn in the circuit court to try the cause, and a verdict of twenty-six dollars and forty five cents was found for Morrison, and judgment thereon rendered in his favor by the court.

The next question involves the correctness of opinions given by the circuit court, on points made in the progress of the trial.

Semple, as he had done at the trial before the justice, relied upon the note given by Richard Taylor, jun. to Richard Taylor, sen. and to which we have already referred, by way of set off against the demand of Morrison; and for the purpose of shewing, that whilst Richard Taylor, jun. held the note afterwards assigned by him to Morrison, and upon which the warrant was issued, he was indebted to Semple a much larger amount, and for the purpose of shewing Semple's right to a discount, the note of Richard Taylor, jun. to Richard Taylor, sen. together with the several assignments thereon, was read in evidence by Semple to the jury; and, after other evidence, going to prove that Matilda Fon-

taine was an infant at the date of the assignment of the note to Semple, was decided to be competent by the court, the fact of her infancy at that time was admitted by Semple. It was also admitted by Morrison, that although the assignment was made to Semple by Nelson, as the agent of Matilda Fontaine, it was done in her presence, and by her direction and consent.

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MORRISON.

Upon these admissions, and on this evidence, the court instructed the jury to disregard the assignment of the note to Semple.

The question is, was the court correct, either in deciding the evidence to be competent which went to prove the infancy of Matilda Fontaine, or in instructing the jury to disregard the assignment to Semple?

The answer to each branch of this question must, we apprehend, be in the affirmative. It would have been otherwise if the assignment had been made by Matilda in proper person, and not by Nelson, who acted as agent for her. If the assignment had been by her own hand, it might, no doubt, as she was in the minority, be avoided by her; but it would not be actually void, and none other except her, and those in privy of her, could lay hold of her minority to avoid it.

An assignment of a promissory note by the infant obligor, is not void, but voidable by him and his privies only, and not objectionable by obligor.

But the assignment purports to have been made by Nelson for Matilda, and the doctrine is well settled, both in this country and in England, that an infant is incapable of making a warrant of attorney, and acts done by the authority of such a warrant are not only voidable, but absolutely and entirely void. Bingham on infancy, 19; Perkins 13. It is true, the assignment to Semple appears not to have been made under any written warrant of attorney; but if, as the doctrine of the law seems to be, acts done under warrants of attorney are void because infants are disabled from appointing an attorney, the result must be the same, whether the attorney be appointed by warrant of attorney, strictly so called, or by parol.

Otherwise of an assignment by the infant's attorney in fact; for an infant cannot make any attorney, by either deed or parol.

But it appears that Matilda was present at the as-

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vs.
MORRISON.

The immediate presence and concurrence of the infant in the act of his attorney in executing a writing as attorney, does not help the case: it is void.

signment, and that it was made by her directions and consent. It was, however, not made by her own hand, but by another for her, and it must be either valid or invalid, according to the rules of law applicable to assignments, which purports, as it does, to have been made by an attorney for her, and not by her personally.

The result is, that the assignment, in judgment of law, is void, if, at the time it was made, Matilda Fontaine was an infant; so that the court cannot have been incorrect, either in deciding competent evidence going to prove her infancy, or in instructing the jury to disregard the void assignment.

The judgment is affirmed with costs.

Semple for appellant; *Loughborough* for appellee.

COVENANT.

Gibbs & Hardin vs. Stone.

Case 58.

Error to the Washington circuit; WM. L. KELLY, Judge.

Covenants for Land. Demand. Conveyances. Acquittances.

June 9.

Chief Justice BIBB delivered the opinion of the court.

Declaration.

GIBBS and Hardin declared against Stone, upon a covenant to convey Stone's moiety of a certain tract of two thousand acres of land, patented to him and William Roberts, the conveyance to be "by a special deed, to be made when called for." The declaration alleged a special request at the defendants residence, on the 13th July, 1824.

Issue on the demand.

The defendant took issue upon the demand alleged.

Evidence.

On the trial, the plaintiff, to prove the demand, introduced a notice, addressed to Stone, and delivered by Jesse McDonald to the defendant, on the 13th of July, 1825, at his house, in these words and figures:—"We now call on you for a deed for the one half of two thousand acre survey of land in Washington county, patented to yourself and William Roberts, agreeable to a bond we hold on you for the same. July 13th, 1825.

"Benj. Gibbs.

"Mark Hardin, sen."

The plaintiff's witness, who proved that he served the notice, also deposed that he had no authority, either from Gibbs or Hardin, to receive the deed; he had not the bond; but informed the defendant that Gibbs was in the neighborhood, about two miles off; neither of the plaintiffs were present at the delivery of the notice.

GIBBS &c.
vs.
STONE.

The court instructed the jury, that to make the demand a good one, the person so delivering this notice, ought to have had the bond with him, and an authority to receive the deed. To this instruction the plaintiff excepted.

Instruction.

The jury found for the defendant.

According to the decisions in *Bridges vs. Hardgrove*, Prin. Dec. 153; and *Vanarsdale vs Craig*, Ib. 321, a special request, precisely alleged, was essential upon assigning breach of the covenant to convey land on request. So, also, in *Shepherd vs. Hubbard*, 1 Bibb, 494; *Worley vs Mourning*, 1 Bibb, 254; *Stafford vs. Trimble*, same, 323. In this latter case, the covenant was to convey on request; the court decided that the time and place of request ought to be certainly and precisely alleged. So, also, in *Sloan vs. Griffeth*, Hard. 9. These decisions concur in this, that the special request, precisely alleged, of a conveyance contracted to be made on demand, is a substantial averment, the omission of which is fatal after judgment by default, or after issue and verdict; consequently a traversable averment. The plea traversing the special request declared upon, was therefore allowable.

In a declaration on a covenant to convey land on request, the allegation of a special request is material, and may be traversed by plea.

But it has been argued, that this plea should have been accompanied by a tender of the deed in court. This was not necessary; for if no cause of action had accrued at the suing of the writ, the failure of the defendant to tender a deed after suit instituted, could not by resilience, give the plaintiff cause of action at the teste of his writ.

In such plea a tender of a deed of conveyance is not necessary.

The notice given in evidence, conferred no authority in itself to the person who delivered it, to demand or accept the deed, he had no authority to demand or accept it; he did nothing but deliver the

Notice in writing, sent by obligee, and delivered in his absence

GIBBS & C.
vs.
STONE.

to obligor, calling on him for a deed for land, obligor was bound to make on request, is not sufficient, without the bearer was authorized to receive the deed and deliver the bond, or make an acquittance.

In such case the obligor must look up the obligee, and cannot, by such notice, shift the duty off himself upon the obligee.

notice, and inform the defendant that one of the obligees was within two miles; he had not the obligation to surrender, upon delivery of the deed, and no authority to give an acquittance. The defendant, upon delivery of the deed, was entitled to have his obligation delivered to him. The conveyance required the concurrent acts of the obligor to deliver, and of the obligees, or their attorney, to approve and accept the conveyance, and surrender the covenant to convey. The evidence, therefore, in no degree conduced to prove a lawful demand; and there is no error in the instruction given.

The act to be performed by the defendant, was transitory, and might have been demanded any where. But as the covenant was to convey when called for, the duty by the obligation was imposed upon the obligee to seek the obligor, wheresoever he could be found conveniently to make the deed. The obligee could not, by the delivery of this notice, shift this duty from himself, and impose upon the obligor the duty to seek the obligee, wheresoever he was to be found, and tender the deed.

It seems to this court, that there is no error, as the plaintiff hath alledged. It is, therefore, considered by this court, that the judgment be affirmed, with costs.

Wickliffe and Mayes for the plaintiffs; Rudd for defendant.

CHANCERY.

Dean's heirs vs. Dean's Ex'r.

Case 59.

Error to the Mercer Circuit; WILLIAM L. KELLY, Judge.

Devise. Executors. Powers. Detinue. Equity.

June 9.

Judge OWSLEY delivered the Opinion of the Court.

THE testator, Thomas Dean, married a wife, by whom he had eight children, and after her death, he married a second wife, by whom he had six children. The last wife survived him. But before his death, and on the fifth of August, 1807, he made and published, in writing, his last will and testament.

After specifically devising two small tracts of land to one of his children, and a grandchild, he proceeded in his will to make the following disposition of the rest of his estate.

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vs.
DEAN's ex'r.

"My will and desire is, that all the rest of my estate, of every kind, be sold, and the money arising from such sale, be divided in the following manner:

Thomas
Dean's will.

"To my son John Dean, twelve pounds, ten shillings; to my daughter Keziah Dean, twelve pounds, ten shillings; to my son Job Dean, twelve pounds, ten shillings; to my daughter Ann Dean, twelve pounds ten shillings; to my daughter Milly, who has lately married Hiram Long, twelve pounds, ten shillings; to my daughter Rebecca Bunnel, one shilling; to my daughter Elizabeth Dean, one shilling. My will and desire is, that my wife Diana Dean, have her dower in such manner as the law directs.

"My will and desire is, that after paying the above legacies, the remainder of my estate, of every kind, be sold, and the amount of the same be equally divided between my seven children, hereafter named; that is to say: my son Henry Dean, my son Thomas Dean, my daughter Sophia Dean, my Son Leven Dean, my son Nathan Dean, my son Summers Dean, and my daughter Mary Trigg, to them and their heirs forever.

"Lastly I do hereby appoint my two sons, Leven and Nathan Dean, my executors to this my last will, &c."

The will was proved, and admitted to record, in the county court of Mercer; and Leven Dean, one of the executors named, took upon himself the execution of the will, the other executor having refused to qualify, &c.

Leven Dean
qualifies as
his ex'r.

The widow Dean, had her thirds of the estate of the testator assigned to her, under an order of the county court of Mercer made for that purpose.

Widow's
thirds assigned.

The acting executor, Leven Dean, subsequently departed this life, having previously however, made and published his last will and testament, in which

Leven Dean
dies, and
Jones, one of

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his executors,
qualifies.

he named George C. Thompson and Jesse Jones his executors. This will was also proved and recorded in the proper court; and the executor, Jones, took upon himself its execution, George C. Thompson, the other executor having refused to qualify as such.

Subject of the
controversy.

Diana, the widow of the testator, Thomas Dean, also died; and the slaves, which are the subject of contest in this suit, are the same, and the increase of them, which belonged to the testator, Thomas Dean, and which were assigned to his widow as her dower slaves, in the estate of her deceased husband.

The plaintiffs in error, who were defendants in the court below, claim the slaves under Diana, the widow, to whom, they contend, the absolute estate in fee of the slaves was devised, by the will of the testator, Thomas Dean.

The defendant in error, who is the acting executor of Leven Dean, claims to possess all the power over the slaves that might have been exercised by his testator, Leven, as the executor of the will of the testator, Thomas Dean; and conceiving that, by the will of Thomas Dean, nothing but a life-estate in the slaves was given to Diana, and that after her death the estate in remainder was to be sold for the use and benefit of the seven children to whom testator, Thomas Dean, directed in his will the proceeds of the residue of his estate, after paying legacies, to go, this suit in equity was brought by him, to obtain from the plaintiffs in error, the possession of the slaves, and to enable him, as the executor of the executor, Leven Dean, to make sale of the slaves, and execute the trust which, in his fiduciary station, it has devolved upon him to perform.

Decree of the
circuit court.

The circuit court was of opinion, that the widow, Diana, took but a life estate in the slaves, and that the remainder should be sold for the use and benefit of the seven children, as directed in the residuary bequest of the testator, Thomas Dean, and made a decree accordingly.

Devise, that

The construction put upon the will by the circuit court, has our entire approval and concurrence. It

is indeed impossible, from any expression of the will, to conjecture even a plausible argument in support of the construction contended for by the plaintiffs in error. Instead of using expressions calculated to shew an intention to give to his wife an absolute estate in fee, in any part of his lands or slaves, the testator, with uncommon caution, has referred to the directions of the law, as the standard by which her interest in his estate was to be measured. It was his will and desire, that his wife, Diana, should have her dower in such manner as the law directs. To a scrivener skilled in his art, expressions like these might not have occurred as the most appropriate that could be used, to point out the precise interest intended to be given to the wife; but to a plain man, such as the writer of the will must undoubtedly have been, the expressions used would naturally occur to be as well calculated as any other, to convey the intention to leave to the wife precisely that interest, and that interest only, in the estate of the testator, which by law she would be entitled to, if no disposition of the estate by the will was made. The interest of the wife, Diana, under the will, is, therefore, in the slaves of the testator, nothing more than for her life, as adjudged by the circuit court.

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DEAN'S ex'r.

my wife have her dower in such manner as the law directs, gives her an estate in one third of the slaves, for life only.

And with respect to the interest in remainder, after the death of Diana, the will, if possible, is more explicit, and shews beyond all doubt, that the testator intended it to be sold, and after paying the legacies previously mentioned, to be equally divided between his seven children therein named.

Remainder in the slaves assigned to the widow, go to the executors to be sold, according to his will.

But admitting such to be the construction of the will, we are met with an objection as to the right of the defendant in error, who was complainant in the circuit court, to maintain this suit in a court of equity.

An executor of an executor, is the executor of the first testator, by both the common law, and our statutes.

The objection was barely stated, without favoring us with the arguments upon which it was expected to be sustained; so that we are left to conjecture, as to the probable grounds upon which reliance is placed by the plaintiffs in error.

DEAN'S heirs
vs.
DEAN'S ex'r.

Without intending to controvert the right of the executor, Leven Dean, named in the will of the testator, Thomas Dean, to maintain the suit, if he were still living, it may possibly be supposed, that the complainant in the circuit court, who is the executor of Leven Dean, has not succeeded to the rights and powers of the executor, Leven, in relation to the estate of the testator, Thomas Dean; and that he cannot, therefore, be entitled to maintain this suit for the slaves in question. If, however, it were conceded that the executor, Leven, if living, might maintain the suit, we should have no difficulty in sustaining the suit brought by the complainant, who is his executor. In his capacity of executor, Leven Dean is not admitted to have possessed any power or authority over the slaves in his lifetime, that did not, after his death, devolve upon the complainant, as his executor. It is not only a rule of the common law, that the executor of an executor, is the executor of the first testator; but it is moreover expressly declared, by an act of the Legislature of this country, that, "executors of executors shall do and perform all things, in the execution of the will of the first testator, which shall remain undone at the death of the first executor, and shall and may sue and be sued in all things respecting the estate, in the same manner as such first executor could or might have sued or been sued."

Power given by the testator to his executor, to sell the slaves and divide the proceeds among certain devisees, passes to the executors, and after the widow's death, he shall sell the slaves she had held as power.

The right of the complainant to maintain any suit which might have been maintained by the executor, Leven Dean, in his fiduciary character of executor to the testator, Thomas Dean, is therefore unquestionable. But, it may possibly be thought by the plaintiffs in error, that as the will of Thomas Dean was made after the passage of the act of 1800, (2 Dig. L. K. 1247,) which declares slaves, as respects last wills and testaments, to be held and deemed real estate, and directs them to pass, by last wills and testaments, in the same manner, and under the same regulations as landed property, that any power over the slaves of the testator, Thomas Dean, or right to sue for them, which the executor, Leven Dean, may have possessed in his life time, was not, strictly speaking, a power or right, growing out of, or in-

cidental to, his office of executor, and therefore not transmissible to his executor.

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vs.
DEAN's ex'r.

The circumstance of slaves being real estate, and passing by last will and testament, as land, does not, however, in the opinion of the court, affect the question as to the right or power of the complainant, as executor of the executor, Leven, over the slaves.

The will of the testator, Thomas Dean, has omitted to direct by whom the sale of his estate directed to be sold, should be made; and considered as real estate, under the act of the Legislature of this country, it became the duty of the executors, or such of them as undertook to act, to make sale of the slaves.

Where the testator devises that land or slaves shall be sold, without saying by whom, the executors who qualify, and after the death of the survivor, his executor shall exercise the power.

The forty-fourth section of the act of the legislature of this country, concerning executors and administrators, (1 Dig. L. K. 531,) provides; "the sale and conveyance of lands devised to be sold, shall be made by the executors, or such of them as shall undertake the execution of the will, if no other person shall be thereby appointed for that purpose, or if the person so appointed shall refuse to perform the trust, or die before he shall have completed it."

Now the power which is thus given to executors, and the duty imposed upon them by this section, are understood to be incidental to the office of executor, and should like other executorial functions, be performed by those upon whom the office devolves. It was accordingly, upon this construction of the act, decided in the case of Anderson against Turner, (3 Marsh. 131,) that the power of executors to sell and convey land, which by the will of the testator was directed to be sold, without naming by whom the sale was to be made, survived to the surviving executor.

The preceding remarks have been made to prove, that as the executor of Leven Dean, the complainant has the same power over the slaves, and the same right to sue for and recover them, that was possessed by the executor, Leven, in his life time. But is it true that Leven Dean, as the executor of

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vs.
DEAN's ex'r.

the testator, Thomas Dean, might maintain a suit in equity for the slaves, if he were living?

An executor empowered by the will to sell slaves for the benefit of certain devisees, cannot maintain detinue against the heirs who obtain the possession.

In such case, the possession may be recovered by bill in equity.

Under the act to which we have last referred, it would undoubtedly be incumbent upon him, if living, to make sale of the slaves, in conformity to the directions of the will, and to enable him to do so most beneficially for the estate, it would seem that some means of obtaining the possession of the slaves held adversely by the plaintiff in error, should be afforded. If, however, there be any possible means, by which he can recover the possession, it must unquestionably be by a suit in equity. Not having the legal title to any of the slaves, the forms of law, which are adapted exclusively to rights of that sort, are totally inadequate to give redress. But courts of equity are not governed by the same formal restriction that control courts of law. It is, indeed, not unusual, where, from defect of the forms of law, justice cannot be obtained in courts of common law, for courts of equity to lend their assisting hand, and give relief. The propriety of doing so in this case is peculiarly apparent; not only on account of the lack of authority in the courts of law, but because the power of the executor over the slaves is in the nature of a trust, which it is at all times a province of courts of equity to control and their duty to afford the most ample assistance in removing all obstructions to its fulfilment.

The decree must be affirmed, with costs.

Daviess for plaintiffs; *Mayes* for defendants.

MOTION.

Harris vs. Smith.

Case 60.

Appeal from the Floyd circuit; S. W. ROBBINS, Judge.

Motions against Constables. Limitations. Jurisdiction.

June 9.

Judge OWSELY delivered the opinion of the court.

Facts of the case.

BETWEEN the years 1817 and 1819, inclusive, Smith placed into the hands of Harris, who was constable of Floyd county, various executions, which issued in his favor against the estate of different persons, from a justice of the peace for that

county. Some of the executions were for more, and many others for less, than five pounds each. Some of the executions were never returned to the justice; others were returned by the constable satisfied, and some again were returned, no property found.

HARRIS
vs.
SMITH.

The returns upon most of the executions bear date more than two years before the 19th of March, 1819; and such as have returns upon them, dated within two years of that time, are for less than five pounds.

On the 19th of March, 1819, a notice was drawn up by Smith, addressed to Harris, in which the latter was informed that on a named day of the next term of the Floyd circuit court, the former would move the court for a judgment against him, on account of his delinquency in various particulars, as respects the collection and accounting for the amount of the several executions.

Notice.

The motion was accordingly made, and judgment rendered by the court in favor of Smith, against Harris, for three hundred and seventeen dollars, fifty-six and one half cents, besides interest and costs.

Judgment.

Various objections, both as to the sufficiency of the notice, and the correctness of the judgment rendered thereon, were taken in argument, most of which, however, need not be noticed, because, admitting the sufficiency of the notice, it is perfectly clear, that the judgment cannot be sustained.

Motion cannot be maintained against a constable, for failing to return an execution, or pay over the money collected on it, after two years.

It was erroneous to render judgment on account of any delinquency, either in the constable, Harris, having failed to return his executions above five pounds within due time, or his having failed to pay the amount collected on those executions, because his delinquency in those respects must have happened more than two years before the date of the notice, and after the lapse of two years, no motion can be sustained against him for such delinquency.

And with respect to the executions for less than five pounds, no judgment should have been rendered, not only because some of them were returned, by the constable, more than two years before the

Circuit courts have not jurisdiction of motions against

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SMITH.

constables
for failing to
return execu-
tions or pay
over money
in cases be-
low five
pounds.

Two or more
such demands
cannot be
united so as
to give the
court juris-
diction.

date of the notice, but because, for a failure to re-
turn those executions in due time, or for not paying
over money collected under them, the constable is
liable to be proceeded against before the justice who
issued the executions, and not to a motion in the
circuit court.

It is true, when added together, the amount of
those executions exceeds five pounds; but the default,
in respect to each execution, gave a substantive cause
of proceeding before the justice, and it is not by uni-
ting several substantive causes of action, which are
recognizable before one tribunal, that the jurisdiction
can be translated to another tribunal, which, with-
out such union of causes of action, possess no cog-
nizance of the matter.

The judgment must therefore be reversed with
costs, the cause remanded, and the motion dismiss-
ed with cost.

Turner for appellant; *McConnell* for appellee.

FERRIES.

Case 61.

June 9.

Pentecost vs. Miller.

Error to the Calloway County Court.

*Ferries within the state. Notice. Statutes. Rates of Fer-
riage.*

Judge MILLS, delivered the Opinion of the Court.

THIS is a writ of error, to reverse an
order of the county court of Calloway, establishing
a ferry across the Tennessee river.

It is insisted, that the order is defective, because
it does not appear that notice was given to the own-
er of the land on the opposite side of the stream.

It is true, that the 1st section of the act of 1796,
does require one month's notice to be given to per-
sons owning land on one or both sides of the stream.
But that section expressly applies to cases where the
stream is all contained within the county, and it has
been held to authorize the establishment of a ferry,
in a case where the applicant held the land on either
side.

Where the
stream is in
the county,
and the ap-
plicant does
not own the
land on both
sides, there
must be no-
tice to the
owner.

But the second section of the act embraces cases where the river is the boundary line of a county, and where the person applying owns the land on one side of the stream. There no notice is required, and the section appears to be an independent provision, regulating and settling all the requisites in the case to which it applies. We cannot therefore add to it the requisition of notice, provided for in the first section, and reverse the case for wanting what the act does not require. Here, the order of court expressly states, that the applicant held the land on one side of the stream, and his application was to grant to the opposite shore, and the act of assembly establishing the county of Calloway, shews that the Tennessee is the boundary line of the county. His case is therefore within the letter of the act.

PENTECOST
vs.
MILLER.

Where the river is the boundary of the county, and the applicant owns the land on the side within the county, no notice is required.

The next exception to the order is, that the county court failed to establish and fix the rates of ferriage. This defect the defendant in error has attempted to supply by producing a general order of that court fixing the rates of all the ferries on the Tennessee; whether this general order is, or is not, sufficient to supply this defect, we need not enquire. For although it might be inferred from a dictum in the case of *Lawless vs. Reese*, 4 Bibb, 309, that such an order of the county court being indispensable, the absence thereof ought to vitiate the rest of the grant, yet it has been since settled, in the case of *Ackler vs. Oldham*, 1 Marsh. 471, that the want of such order fixing rates, ought not to reverse the order granting the ferry, which is a separate and independent order.

Omission of the county court to fix the rate of ferriage, does not render the order establishing the ferry, erroneous.

The rest of the exceptions to the order, do not seem worthy of notice.

The order is affirmed, with costs.

Meyes for plaintiff; *Darby* and *Pope* for defendant.

SLANDER.

McGowan vs. Manifee.

Case 62.

Error to the Bath Circuit; SILAS W. ROBBINS, Judge.

Actionable words. Colloquium. Evidence. Confidential communications.

June 10.

Chief Justice BRIBB delivered the Opinion of the Court.

THE first, second, and third counts, state a colloquium between the plaintiff and one Charles Day, of and concerning a charge which had been made against the plaintiff, of stealing bank notes from Bryan & Co. in which the plaintiff was interrogating said Day, whether he had made such charge against him, of stealing the money. The first count, in reference to this colloquium, states, that the defendant said, "you did take it;" the second count charges, that the defendant said, in reference to said colloquium, and to the plaintiff, in presence of divers persons, "I suspect you;" the third count charges, that the defendant said, in reference to said colloquium, and to the plaintiff, "I suspect you of taking it."

First, second, and third counts, ruled to be insufficient by the circuit court.

The court instructed the jury to disregard these counts, as being insufficient.

Without the colloquium, the words charged in these counts would be unintelligible; but if spoken, as alleged, in reference to the subject of the conversations between the plaintiff and Day, then, they did import a charge of felony, and were actionable.

Fifth and seventh counts, held, by the circuit judge, to be insufficient.

The fifth count charges, that the defendant spoke of and concerning the plaintiff, these words: He stole a large sum of money of Joseph T. Bryan, and that the defendant would way-lay and search the plaintiff, on his way to Flemingsburg. The seventh count charges, that the defendant, in speaking of and concerning the money which Bryan had lost, did publish of and concerning the plaintiff, these words, "He stole the said money of said Bryan, and the defendant would way-lay and search the plaintiff, on his way to Flemingsburg." These counts were also declared by the judge to be insufficient, and the jury were instructed to disregard them.

The decision of the court was probably influenc-

ed, as to these latter counts, by the determination in Barham's case (4 Co. 20). But the cases of Hume vs. Arrasmith, (1 Bibb, 165,) and Logan vs. Steele, (same, 593,) will furnish the reasons for not applying the old and rigid rules, which formerly required that the words themselves spoken should designate the person, and contain a direct charge of felony. Words are to be taken, neither in the milder, nor in the more grievous sense, but in that sense in which they would be understood by those who heard them; the judge ought not to torture them into a charge of guilt, nor explain them into innocence, contrary to their obvious import.

**McGOWEN
vs.
MANIFER.**

In counts in slander, the words are to be taken in neither the milder nor more grievous sense, but in that the hearers would understand them.

With respect to all these counts, so withdrawn from the jury, the cases of Logan vs. Steele, and Hume vs. Arrasmith, will be found to contain a refutation of any objection to either, because the expressions were only of suspicion or opinion, and not positively charging a felony, or because the name of the plaintiff was not mentioned.

Expressions of suspicion, or opinion, may amount to slander.

Formerly the words themselves must designate the person; now the colloquium may do it.

The court excluded the testimony of George Owings, because of the confidence and friendship which had existed between the witness and the defendant, from their childhood, and because the conversations detailed were desired by the defendant not to be mentioned for fear the plaintiff would get intimation of the defendant's plan, of having the plaintiff searched for the stolen money, on his way to Flemingsburg. The testimony of Bryan, the owner of the store, and person from whom the money had been stolen, after being detailed, was, on motion, also excluded, because the defendant was the clerk and servant of said Bryan. The testimony of Ch's. A. Day was excluded, on motion of defendant, because the frequent expressions by the defendant, as to his suspicion and belief that the plaintiff had stolen Bryan's money, were never, to his recollection, made openly in the street, but only in the store and at Bryan's house, and because this witness and the defendant were both clerks in the store of Bryan. That the judge erred in these several opinions, hardly need be said. The communications made to these witnesses severally, by the defendant, were of

Confidence between witness and defendant, injunction of secrecy, and the like, no objection to the proof of the publication of the slanderous words.

M'GOWEN
vs.
MANIFEE.

a very slanderous character, as charged in the declaration, they were not made by the defendant to his counsellor and attorney at law, nor under any such circumstances as the law regards as sacred and inviolable.

Instructions,
 as in case of
 a nonsuit er-
 roneous

The bill of exceptions, in addition to the statements which had been made by those three witnesses whose testimony had been so heard and excluded, proceeds to state the testimony of Mr Jeremiah Spurgin, and of Mr Fisher. After these witnesses were examined, (the testimony of the witnesses, Owings, Bryan, and Day, having been, as aforesaid, excluded) "the defendant moved the court to instruct the jury to find as in case of a nonsuit, on the ground that the foregoing evidence was insufficient to support any one of the counts in the plaintiff's declaration, which instruction the court gave; to all of which decisions the plaintiff excepts." The testimony of Spurgin and Fisher detailed very slanderous charges, made by the defendant against the plaintiff, which were more precisely applicable to those counts, which had been excluded from the consideration of the jury, but were also applicable to the sixth count. It would be tedious to detail all the evidence given by the five witnesses. Suffice it to say, that they did prove the slanderous words, substantially, as charged in the declaration, and in manner and under circumstances which could leave no doubt as to the obvious meaning of the defendant, to charge upon the plaintiff, that he had stolen Bryan's money.

The plaintiff has declared for a grievous slander; he proved it on the defendant by five witnesses; it was circulated in an insidious manner, and repeated at various times; but after all, by a series of blunders, the case has been arrested from the jury by the court, and upon the plea of not guilty, the defendant has judgment against the plaintiff for costs.

Judgment
 and mandate.

It seems to this court that the circuit court erred in each and all of the opinions set down in the bills of exceptions taken by the plaintiff. It is therefore considered by the court that the judgment of the

circuit court be reversed, and that the case be re- M'GOWEN
manded for a *venire facias de novo*.

VS.
MANIFEE.

Plaintiff to recover his costs.

Chiles, Haggin and Loughborough for plaintiff.

Com'th for Harrison, vs. Pearce's ex'x. DEBT.

Error from the Jefferson Circuit; HENRY FIRTLE, Judge. Case 63.

*Collectors of militia fines. Statutory Bonds. Actions.
Militia paymasters.*

Judge OWSLEY delivered the Opinion of the Court.

June 10.

THIS case turns upon the correctness of the decision of the circuit court, adjudging insufficient the plaintiff's declaration, upon a demurrer filed by the defendant.

The declaration is in the name of the Commonwealth, on the relation of Harrison, paymaster of the first Regiment of the Kentucky Militia, on a bond executed by the testator Pearce, Brook Hill, &c. to the Commonwealth, the 16th day of January, 1822.

There is subjoined to the bond, a condition, which is set forth in the declaration in the following words:

"The condition of the above obligation is such, that whereas the above bound Brook Hill, under the authority of an act of the assembly of the Commonwealth, entitled, an act for the benefit of the first Regiment of the Kentucky Militia, and for other purposes, has been appointed, by the board of officers of the said Regiment, collector of the fines and other demands, assessed by and due the said Regiment, and which may hereafter become due, and also collector of the fines, and other demands assessed by and due the said Regiment, for the years 1820 and 1821, which may be due and unpaid at the time of the passage of said act. Now, therefore, in case the said Brook Hill shall well and truly collect the said fines and dues, assessed by and due the said

Condition of
the bond de-
clared on.

**COTYH FOR
HARRISON
vs.
PEARCE'S
EX'X.**

Regiment, or which may hereafter be assessed by, and become due to the said Regiment, whilst the said Hill shall continue in his said office of collector, and account for, and pay the said fines and dues, to the paymaster of the said Regiment, at the time or times, and in the manner which sheriffs of the said Commonwealth were bound by law to collect, account for, and pay the same; then the above and foregoing obligation shall be void, otherwise the same shall be and remain, in full force and virtue, &c."

**Assignment
of breaches.**

And for breach of the condition, the plaintiff, in his declaration, avers, that while the said Brook Hill continued in his said office, of collector of said Regiment, there were placed in his hands, fines assessed by and due said Regiment, the followingsums, to-wit: For the year 1819, the sum of \$43; for the year 1820, the sum of \$3747 50 cents; for the year 1821, the sum of \$3629; for the year 1822, the sum of \$814; and for the year 1823, the sum of \$1519; the whole amounting to the sum of \$9754 50 cents; which said several lists of fines, assessed by and due said Regiment, and placed in said Hill's hands for collection, as aforesaid, the said Hill has failed and refused to collect, account for, and pay, to the paymaster of the said Regiment, at the time or times, and in the manner which sheriffs of said Commonwealth were bound by law to collect, account, and pay, &c.

**Collector of
militia fines,
appointed by
the officers of
a regiment,
has no power
to collect
fines imposed
after his ap-
pointment.**

By adverting to the act of assembly, to which the condition of the bond refers, and under which the officers of the Regiment derived their authority to appoint a collector, it will be perceived, that the condition of the bond as set out in the declaration, does not in all respects conform precisely to the requisitions of the act. The condition of the bond declared on, contains a stipulation, not only for the due and faithful performance of the duties of Hill, the collector, in the collection and payment of fines and demands, which at the date of the bond, had been assessed by the Regiment, and which were then owing and due, or might thereafter become due, but it also contains a stipulation for the collection and payment, by Hill, of fines and demands which

might thereafter be assessed by the Regiment; and by turning to the act of assembly, it will be found to contain no provision which, according to any fair interpretation, can be construed to authorize the Regiment to appoint a collector, to collect fines or demands which may, after the appointment, be assessed by the Regiment, and it is only to secure the collection and payment of fines and demands, which might be assessed at the time, and for the collection of which, the Regiment was authorized to appoint a collector, that the bond is required by the act.

COM'TH FOR
HARRISON
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EX'X.

It would, therefore, seem necessarily to follow, that, as respects the fines and demands to be assessed after the date of the bond, the condition is inoperative, and not binding on Hill, the collector, or his sureties. For if the Regiment possessed no power to appoint Hill as the collector of after-assessed fines and demands, his being appointed can have conferred no authority on him to collect them, and it would be preposterous to give a construction to the bond, which would impose an obligation upon him, or his sureties, for the faithful collection and payment of fines and demands, when, from his appointment no power to make such collection was derived. According to this construction of the bond, the breach which is alleged, in the failure to collect and pay the after-assessed fines, &c. is bad.

Such part of of the condition of such collector's bond as would bind him to collect such subsequent fines, is ineffectual.
—But,

Other breaches are also assigned, and though some may be bad, if there be any sufficient breach assigned, the declaration should not have been adjudged bad on demurrer; so that it becomes necessary to bestow some attention to the other conditions of the bond.

It seems such bond is good to secure the collection of the fines previously imposed.

With respect to them, they are not, it is true, in precisely the words of the condition required by the act, but there is not such a discrepancy between them and the condition required by the act, as, in our opinion, should render them inoperative, and not binding on the sureties of the collector, Hill. Those conditions are understood to embrace fines and demands which, at the date of the bond, had been assessed, and which had not been previously collected; and though, in pointing out the manner

Not necessary in the condition of such bond to enumerate the duties of the collector, but the specification of those imposed by law will not vitiate it.

COM'TH FOR
HARRISON
VS.
PEARCE'S
EX'X.

and time of collection, and the person to whom the amount thereof was to be paid by the collector, those conditions are more special than the act required the condition of the bond to be, the discrepancy in that respect is more of form than substance, and the condition should not, therefore, on that account, be adjudged inoperative. To have been in the words of the act, the condition should have been for the *faithful discharge of the office of Hill, as collector*, without naming or describing the person, to whom the fines and demands, when collected, should be paid, as the condition of the bond has done. But the payment of the money, when collected, most certainly formed a part of the duties of the collector's office; and it can be no solid objection to the condition of the bond, that it required payment to be made to the paymaster, whose duty by law it is to receive the same, when collected.

Bonds of collectors appointed by the officers of a regiment, ought to be made payable to the Com'th.

But it is objected against the bond, that there is no law authorizing it to be taken to the commonwealth. It is true the act of assembly, under which the collector was appointed, has omitted to name to whom the bond should be given; but it should not be forgotten, that the duties which, by his appointment, devolved upon the collector to perform, constitutes part of what would have been the official duties of the sheriff of the county, if he had not been appointed; so that, in requiring a bond to be given by the collector, it is but fair to infer, that the legislature intended the bond should be given to the commonwealth, to whom the official bonds of sheriffs are regularly given.

Actions may be maintained on such bonds in the name of the common'th, at the relation of the paymaster of the regiment.

An analogous answer may be given to the objection, that the act has not authorized the bond to be put in suit by the paymaster. If, instead of being placed in the hands of the collector, the fines and demands had been put into the hands of a sheriff, whose duty would have been to collect and pay over the same, there could have been no reasonable doubt as to the right of the paymaster to put the sheriff's bond in suit, on his failure to collect and pay the amount; and the reason is equally strong in favour of permitting suit to be brought by the paymaster,

upon the bond given by the collector to perform that which would otherwise have been incumbent on the sheriff to do, especially as the condition of the bond expressly stipulates for payment to be made to the paymaster.

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ex'x.

Upon the whole, we think that the bond is a valid one, and that the condition, so far as respects the fines and demands assessed by the Regiment before its date, is binding on the sureties of the collector, and that the breach alleged in that condition is sufficiently charged in the declaration.

Bond valid,
so far as con-
formable to
the statute.

The demurrer should, consequently, have been overruled by the circuit court.

The judgment must, therefore, be reversed, with costs; the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

Judgment
and mandate.

Denny for appellant.

Bodley vs. Hord.

MOTION.

Error to the Mason Circuit; W. P. ROPER, Judge.

Case 84.

Occupant laws. Habere facias possessionem. Continuance. Practice.

Judge MILLS delivered the opinion of the court.

June 10.

THIS is an ejectment, and was heretofore brought to this court, and decided, and the report of the case will be found in 5 Litt. Rep. 88. On the return of the cause to the court below, Hord succeeded in obtaining a judgment for all the land in dispute, and Bodly obtained the appointment of commissioners to value improvements. This took place at the November term, 1824, of the court below.

Statement of
the case.

At the August term, 1825, Hord obtained a rule against Bodley, to shew cause why he had not procured a report from the commissioners, and why, on account of the delay, a writ of possession should not issue.

BODLEY
vs.
HORD.

Order of the
 circuit court
 for writ of
 possession.

Cause shewn
 against the
 rule.

At the November term, 1825, this rule was heard, and a writ of possession was ordered. The only cause shown by Bodley, why he had not proceeded with the commissioners to obtain the valuation of improvements, was, that there was a chancery suit depending between the parties for the same land, and an interlocutory decree was rendered therein, at the said November term, 1825.

In that chancery suit, an agreement had been entered into, and signed by the parties, in which, among other things, touching the preparation of the suit, the following clause was inserted: "And it is further agreed between the parties, that all other suits depending between the parties, or upon the claims under which they hold, so far as their claims interfere, shall await the final decision of this suit." This agreement was signed and sealed, and remained on file in the chancery suit. The land here in controversy was the same controverted in equity. The court below nevertheless ordered execution to issue, and Bodley, to that order, has prosecuted this writ of error.

If the unsuccessful defendant in ejectment, after having commissioners appointed under the occupant laws, fail to cause them to act and report, the plaintiff may, after the proper rule, have an order for the writ of possession.

It was certainly proper to take the method resorted to by Hord, for the purpose of bringing the claim for improvements to a close. He could not be bound to lie by forever under the claim for improvements, without its being brought to an issue, and without any remedy to hasten his adversary; and the mode he pursued was a proper one. The claim set up by Bodley for improvements was, in the nature of a suit, and as all other suits may be dismissed when the plaintiff will not proceed to trial or prepare for it; so may this claim. Hord, on this occasion, waited about nine months upon Bodley, and in that time no step was taken to value improvements. He was, therefore, justifiable in attacking the order.

Agreement between the parties relied on against the rule, and motion for the

The question then remains, was the written agreement shewn by Bodley, sufficient to excuse his delay and neglect to execute the order? We conceive not. That agreement was not an entry on record, nor was it made to operate as an injunction. To give it even that effect in a court of equity, it would

have to be set up by bill, or proper allegations, and an injunction be obtained thereon, in usual terms. It was, therefore, not competent to barely produce this writing in answer to a motion, in one of the common law suits referred to therein, and there to ask that it might operate as an injunction, and stay all proceedings. Such an agreement is contestible, and may be set aside, and to give it specific performance on motion, would give it an incontestible effect. The most that could be made of it would be a continuance, lest he should be surprised. But the instrument is not produced for that purpose. Moreover, if the agreement could have had such an effect once, it had been violated without controversy, and Bodley had acquiesced in the violation. The parties had progressed in this ejectment without seeming to suppose that it was affected by the agreement till the judgment was obtained which terminated the suit for the land, and there was properly no suit depending about the land. That was ended, and the claim of Bodley for improvements was a new claim, resulting from the determination of the first suit, and one to which the spirit of the agreement did not apply to delay it. The operation of the agreement upon the ejectment might have been effectual before judgment, and the parties not having so applied it, raises a presumption that it was done away, or did not apply; and as the judgment is obtained, it could not still be made use of to protract the controversy for improvements by keeping the order appointing commissioners always existing, and yet never to be executed till the chancery suit was ended.

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vs.
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writ of *habere facias possessionem*, held under the circumstances of the case, inapplicable, and not sufficient cause against the rule.

The judgment is affirmed, with costs.

Judgment affirmed.

Crittenden and Bledsoe for plaintiff; Triplett for defendant.

CHANCERY.

Milam &c. vs. Thomasson.

Case 65.

Error to the Scott Circuit; JESSE BLEDSOE, Judge.

*Absent defendants. Orders of publication. Parties.
Practice in this court.*

June 10.

Judge MILLS delivered the Opinion of the Court.

THIS is a writ of error to reverse a decree in chancery, rendered in a suit, or rather two suits combined, wherein Samuel Thomasson was complainant, and Milam and others were defendants.

Wm. Massie
a necessary
party.

Whether the facts be as contended for by complainant, or insisted upon by the defendants, William Massie is a necessary party, and so obviously necessary, that it is not deemed expedient to recite the history of the cause, so far as to exhibit the relation in which he stands.

An order for
the appear-
ance of an
absent de-
fendant on or
before the
calling of the
cause at the
next term, is
insufficient.

Indeed he is named as a party in the bill, and not being found by process, an order of publication, or rather two of them, were had against him, and were returned as published by the certificate of the editor. But we cannot suppose that these orders are sufficient in their terms, or that the proof of insertion is sufficient. The orders made at one term, fix the appearance day on or before the calling of the cause at the next term. Now a chancery suit has not any day in term, at which it must necessarily be called, or indeed be set for hearing. It depended, therefore, on a contingency, whether there would or would not be a day in the next term, on which the defendant ought to appear; and as it does not appear that the cause was actually called at the next term, there consequently was no day of appearance, and it was erroneous to decree, by default, against the absentee, for not appearing at a day not fixed or pointed out.

The act re-
quires a cer-
tain day to
be fixed in
such an or-
der.

The act of assembly requires a named day in every such order. We admit, that day may be a specified juridical day of a term, but are unwilling to say that the law is satisfied by a day which may or may not happen, even if it should have actually occurred. But when there is no evidence that there was any calling of the cause, at the time appointed, it would

be still more absurd to convict the absentee of de- **MILAM &c.**
fault. **vs.**

THOMASSON.

But the certificate of insertion is insufficient, even if the order was valid. It is indispensable that every such certificate should show that the whole number of insertions took place, between the date of the order and the day of appearance. Here the certificate states barely the number of insertions, without saying when; nor is there any date to the certificate itself. Its terms would be true, if the insertions had all taken place after the appearance day, equally as if they were all before it, and therefore the proof of publication is insufficient.

Certificates of the publication of orders for the appearance of absent defendants must shew that the number of insertions required took place between the date of the order and appearance day.

As this conclusion will open the cause and place it back, at so early a stage of the proceedings, that either party may materially alter the merits by other allegations or proof, before another hearing, we deem it unnecessary to say any thing upon the merits of the controversy.

Necessary parties not being before the court, the discussion of the merits declined.

Decree reversed with costs, and cause remanded for new proceedings, not inconsistent with this opinion, or the rules of equity.

Talbot for plaintiff; *Depew* and *Chambers* for defendant.

Tate vs. Parrish.

CASE.

Error to the Clarke Circuit; **GEO. SHANNON**, Judge.

CASE 66.

Springs. Water courses. Prescriptions. Abatement of nuisances. Assize of nuisance. Action on the case. Evidence. Damages.

Judge **OWSLEY** delivered the Opinion of the Court.

June 14.

TATE and **PARRISH** were possessed of adjoining tracts of land, the division line between them passing within a short distance from the house of **Tate**.

Case stated.

Upon the land of **Parrish**, and not more than one hundred and fifty yards from **Tate's** house, there is a spring, the water of which flows directly into the land of **Tate**. This spring, **Tate** and those under

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VS.
PARRISH.

whom he held his land, had been accustomed uninterruptedly, for twenty years, to use.

From a point more remote than the spring from Tate's house, a dead hog was dragged about two hundred yards, in the heat of summer, by Parrish, and thrown into the spring. This was done by Parrish, whilst Tate was from home, and Tate's wife, without his knowledge, or any authority from him, attempted to remove the hog from the spring, and thereby abate the nuisance; but it was so offensive that she could not do it.

Tate and his family were not only greatly annoyed by the stench of the hog, but the water of the spring was corrupted, and by its connexion with Tate's water, in the branch below, made it unfit for use.

Verdict, and
 judgment for
 defendant.

To recover for this injury, Tate brought his action on the case in the circuit court; but on the trial, after several decisions of that court, he was defeated, and judgment rendered against him.

On the trial, Tate introduced a witness, and was about to prove that he, and those under whom he claims, had, for twenty years before the hog was put into the spring, used the water of the spring; but the making such proof was opposed by Parrish, and not allowed by the court.

Instructions
 of the court.

After the evidence was all through, the court, on the motion of Parrish, instructed the jury, that if they believed from the evidence, that the plaintiff's wife removed the hog from the spring, or attempted to abate the nuisance, they ought to find for the defendant, whether such a removal, or attempt to remove, was by the order of the plaintiff or not, for as to that, she ought to be considered as the servant of the plaintiff; but that if she attempted to remove it and could not do so, then they ought to find for the plaintiff.

Whether, in excluding the evidence offered by Tate, and in instructing the jury on the motion of Parrish, the court below was correct, are the only points presented for the determination of this court.

We think the evidence ought not to have been excluded. To be admissible, it is not necessary that the evidence should be decided to be conclusive as to Tate's right to use the water of the spring. If it conducted in any degree to prove that he was entitled to the use of the spring, or if it was calculated to aggravate the injury occasioned him by the act of Parrish in throwing the hog into the spring, the evidence was undoubtedly pertinent to the point in contest, and should have been allowed to go to the jury; and twenty years uninterrupted use of the water was, we apprehend, not only in some degree calculated to prove title in Tate to the use of the water, but was moreover well calculated to aggravate the offence done by Parrish, in throwing the hog into the spring. The motive by which Parrish was actuated in doing the act complained of, is doubtless a legitimate subject for the consideration of a jury, in assessing damages; and what could be better calculated to display that motive than evidence of Tate's uninterrupted use of the water of the spring for twenty years before the act done?

The instructions are liable to several objections. In the first place, they are in some respects so inconsistent and contradictory in their different parts, that it was impossible for the jury distinctly to comprehend the principle of law which was intended to be decided by the court. In one part of the instructions, the jury were informed, that if they believed from the evidence, that Tate's wife attempted to abate the nuisance, they ought to find for Parrish, and in another part, they were told that they ought to find for Tate, if his wife attempted to remove the nuisance but could not do so.

But in other respects the instructions are erroneous, in points easily to have been understood by the jury. In cases of private nuisance, the injured party may either abate the nuisance, or resort to his action by suit in court for redress, and after making his election, and having abated or removed the nuisance, it is said he is entitled to no action: 3 Bl. Com. 219. But this general observation of Black-

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PARRISH.

In an action against my neighbour, for polluting the water of a spring rising in his land and running through mine, evidence that I and those under whom I claim have used the spring for twenty years, is competent both to prove my right to the use of the spring, and to aggravate the damages for the injury to the water flowing into my ground.

Contradictions in instructions, is error.

If I abate a private nuisance, I cannot afterwards maintain an assize of nuisance.

TATE
vs.
PARRISH

stone, though undoubtedly true as respects an assize of nuisance, must, we apprehend, be subject to some qualification. After having, by his own act, abated or removed the nuisance, it would be absurd to suppose that the injured party could maintain an assize of nuisance, the judgment in which, if for the plaintiff, should be for an abatement of the nuisance.

Otherwise of
case; I may
maintain this
action for the
damages sus-
tained.

But the object of the plaintiff is not the same in an action on the case; nor would it be competent, in such an action, for the court to render judgment in favor of the plaintiff, for the nuisance to be abated. There is not, therefore, the same reason for precluding the injured party from maintaining an action on the case for a nuisance, after the nuisance is removed by him, as exists for not allowing an assize of nuisance; and hence it is said, that if the nuisance be removed, the plaintiff is entitled to his damages, which accrued before, and though it is laid with a *continuendo*, for a longer time than the plaintiff can prove, he shall have damages for what he can prove before the nuisance was removed. 2 Mod. 253; Jacob's L. Dic. title, Nuisance, 3.

Whether or not the court was correct in treating the act of Tate's wife, in her attempt to remove the nuisance, as the act of Tate, cannot, therefore, be material; for if in that the court was right, it was most clearly erroneous, to instruct the jury that they ought to find against him, if from the evidence they should believe that the nuisance had been abated or removed by his wife; because, if removed, he has still a right to maintain his action on the case, for the damages which accrued before the removal.

The judgment must be reversed, with cost, the cause remanded to the court below, for further proceedings to be there had, not inconsistent with this opinion.

Hanson for plaintiff.

Baxter vs. Evett's lessee.

EJECTMENT.

Appeal from the Estill circuit court; GEO. SHANNON, Judge.

Case 67.

Boundaries of surveys. Lines and corners.

Chief Justice BISS, delivered the opinion of the Court.

June 10.

In 1825, this ejectment was instituted. The plaintiff claims by patent of 1812, for 150 acres, by survey of 1803, in consideration of a certificate granted by the county court of Madison, of February, 1803, by virtue of the act of Kentucky for settling and improving her vacant lands.

Plaintiff's claim.

The defendant claims under a patent dated in 1800, issued to Glasscock and Orear, in consideration of a Virginia Land Office warrant, surveyed in 1795, for 4086 3-4 acres.

Defendant's claim.

The plaintiff gave evidence of the existence of a single corner, corresponding in marks with one of those named in his patent, and claimed by the courses and distances protracted from that corner, no other corner or marked lines of his patent being shewn; he proved that the courses and distances from this corner, according to his patent, will include the land in controversy; and proved that the defendant was in possession at the service of the ejectment.

Plaintiff's evidence of his boundary, and defendant's possession.

The defendant gave evidence, conducing to show the reputed boundaries of the patent of Glasscock and Orear, and that these reputed boundaries included the land in controversy. The courses and distances from abuttal to abuttal, in the patent of Glasscock and Orear, named, are about twenty five in number, of which about nineteen are extant, and not disputed—that is to say: the corners, on the annexed diagram, at figure 1, and the lines around by 2—18 to 19, are all found marked, and corresponding with the patent so plainly, that no question arises in this quarter. But the plaintiff desires to protract the survey of Glasscock and Orear from 19 around to 1, according to the lines 19, K, L, M, 27, 24, 1. The defendant in ejectment claims this patent by the lines, 19, 20, 21, 22, 23, 24, 1.

Defendant's evidence of his boundary.

A, B, C, D, E represents the plaintiff's patent as claimed by him.

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see.

The line 19—K, is according to the course and distance named in the patent of Glasscock and Orear; but no corner is found there, nor any marked line or corner from thence by L, M, 27.

A deed by Evett, the lessor of the plaintiff, to Miller, dated in 1818, for 85 acres, part of his patent for 150 acres, professes and names to be bounded by one of the lines of Orear and Glasscock; and the defendant gave evidence, conducing to show, that 20, 21, is the line so alluded to in that deed.

At 22 there is a black oak, marked as a corner, and a plain marked line from 22 to 23.

The lines 22, 23, 25, 26, represent a part of the abutments of Walton's survey, called for in the patent of Glasscock and Orear.

The evidence of the defendant conduced to prove, that 22 to 23 has been reputed, for twelve or fifteen years past, the line of Walton, and the line of Glasscock and Orear.

There was evidence, also, that the lessor, Evett, had acknowledged, some eight or nine years ago, that the land now in controversy, was inside of Glasscock and Orear's patent.

The plaintiff gave evidence conducing to shew, that the black oak corner at 22, and the line 22, 23, were, in appearance, too new to have been marked for Glasscock and Orear.

Another witness stated, that about twelve or fifteen years then past, he had been around the lines of Glasscock and Orear, with Joseph Barnett, the surveyor of the county; that the lines were then run by Barnett, as now claimed by defendant, and would include the land in controversy.

Another witness stated that the black oak, at 23, had been, for some years past, called Orear's corner in Walton's line.

Surveyor's
report.

From the surveyor's report and plat, it appears that from the corner 19 to 20, the distance is 850 poles, exceeding the distance named in the patent by one hundred and fifty poles; and that the actual distance from 24 to 1, or 27 to 28, is seven hundred

poles, instead of five hundred and twenty eight poles.

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see.

Discussion of
the evidence
of defend-
ant's bound-
ary.

Taking the two undisputed corners, 1 and 19, and the marked boundaries between them, which constitute the southern and eastern boundaries of the survey, and the northern and western boundaries of the patent cannot be closed by the protraction (even disregarding all marked abutments named,) without departure from distance on some one or more of the lines; and to close the survey, by following Walton's line as represented on the plat, it becomes indispensable to lengthen some of the lines. That is to say, the undisputed abutments for the southern and eastern parts of the survey, now visibly extant, as originally demarked, have demonstrated an excess there, above the distances named in the patent; so that an excess above the distance named in the patent, for the northern and western lines becomes indispensable, on some one or other of those lines, otherwise the survey can not be closed.

This necessary departure from the patent distance, somewhere, has produced this controversy. The plaintiff in ejectment contends, that for the northern and western boundaries, no abutments are visible; and, therefore, that the survey is to be completed by resort to the courses and distances, closing the survey by intersections, and so as to exclude from the area of the patent of Glasscock and Orear, the survey of one hundred and fifty acres, as claimed under the patent of Evett. The defendant contends that he has given such evidence touching the lines 20 to 21, and 22 to 23, as that the patent of Glasscock and Orear should be extended to them, and that the evidence relative thereto, if believed by the jury, ought to control and govern the survey, in preference to the ideal constructive boundary contended for by the plaintiff.

The patent of defendant, (that is, of Glasscock & Orear, whose deed he holds,) begins at 1—describes it as the corner of Wm. French—and then progresses on to 19, by courses, distances and abutments, which need not be recited; from 19 (a very large white oak, corner to Wm. Mayo,) the description is, south

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86 west, 700 poles, to pointers, corner for Rob. Whitley; with his lines, south 196 1-2 poles, to pointers, another of said Whitley's corners; west, 100 poles, with said Whitley, to another of his corners, in Robert Walton's line; thence with Walton's line, south, 453 1-2 poles, to pointers, corner for Wm. French in said Walton's line; thence with French's line, east, 160 poles, to pointers; with another of said French's lines, south, 528 poles, to the beginning. From 19, around by 20, and so on to 1, the patent names no specific tree; these abutments are described by reference to Whitley's, Walton's, and French's lines and pointers, except at Whitley's corner in Walton's line at 22, where a corner is called for, but the tree is not specified; there the black oak corner stands.

Instructions
moved by the
defendant,
and overruled
by the court.

The defendant moved three instructions, all of which were hypothecated upon the jury's finding the corners 1 and 19. The first instruction was substantially intended to declare the law to be, that the reversed courses and distances of defendant's patent, from the corner at 1, around westwardly, to find the intersections and ideal boundaries, were to be resorted to, only in case the jury should find no marked line nor corner on the said reversed courses, between the beginning at 1, and the line running westwardly from 19; this the court refused.

The second instruction asked, proposed, that if they found the corner at 19, but no marked corner on the line westwardly, and found the corner of said Glasscock and Orear, at 22, then the desired corner on the line westwardly from 19, was to be determined by intersection, by reversing the lines from the corner found at 22, and pursuing those lines if marked, if not marked, by pursuing the patent course and distance; thence to reverse the next course of the patent, and pursue it to intersect the line from 19, westwardly, if marked, or if not marked, according to the patent course, and that the intersection so found upon the westwardly, line would be the corner; this was denied.

Thirdly, to instruct the jury, that if they believed there was a marked corner of Glasscock and Orear's patent at 21, and no marked corner on the line 19,

20, except at 19, and that running from said corner at 21, according to the reversed calls of said patent, and running the line from the corner at 19, would make the intersection at 20, as represented on the plat, that then such intersection at 20 would be the corner; this the court refused to give except with this qualification: provided the jury should believe, by reversing the courses and distances from the beginning (at 1,) the corner should be found at 21, or that the reversed lines were marked.

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see.**

The jury found for the plaintiff; the defendant moved for a new trial, because the jury found against the law and the evidence, and because the court misdirected the jury; the new trial was refused; and the whole evidence is stated in the bill of exceptions, together with the instructions moved as aforesaid.

Verdict and judgment for plaintiff, and motion for new trial overruled.

The rule is, that the visible or actual boundaries, natural or artificial, called for in a certificate of survey, are to be taken as the abutments, so long as they can be found, or proved. The legal presumption is, that the surveyor performed the duty of marking and bounding the survey by artificial or natural abutments, either made or adopted at the execution of the survey. And if this presumption could be destroyed by undoubted testimony, yet as this was the fault of the officer of the government, and not of the owner of the survey, his right ought not to be injured, when the omission can be supplied by any rational means and description furnished by the certificate of survey. In locating a patent, the inquiry first is, for the demarcations of boundary, natural or artificial, alluded to by the surveyor. If these can be found extant, or if not now existing, can yet be proved to have existed, and their locality can be ascertained, these are to govern. The courses and distances specified in a plat and certificate of survey are designed to describe the boundaries as actually run and made by the surveyor, and to assist in preserving the evidence of their local position, to aid in tracing them whilst visible, and in establishing their former position in cases of destruction by time, accident, or fraud. As guides for these purposes, the courses and distances named in a plat and

Actual abutments, artificial or natural, made or adopted by the surveyor, govern the boundary wherever they are extant, or their former existence can be proved.

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see.

certificate of survey are useful. But a line or corner established by a surveyor, in making a survey upon which a grant has issued, can not be altered because the line is longer or shorter than the distance specified, or because the relative bearings between the abutments vary from the course named in the plat and certificate of survey. So, if the line run by the surveyor be not a right line, as supposed from his description, but be found by tracing it to be a curved line, yet the actual line must govern; the visible actual boundary, the thing described, and not the ideal boundary and imperfect description, is to be the guide and rule of property. These principles are recognized in *Beckley vs. Bryan*, prin. dec. 107, and *Litt. Sel. Cas. 91*; *Morrison vs. Coghill*, prin. dec. 362; *Lyon vs. Ross*, 1 Bibb 467; *Cowan vs. Fauntleroy*, 2 Bibb 261; *Shaw vs. Clement*, 1 Call. 438, 3rd point; *Herbert vs. Wise*, 3 Call. 239; *Baker vs. Glasscocke*, 1 Hen. & Munf. 177; *Helm vs. Small*, Hard. 369.

In the case under consideration, it does appear from the evidence given, that the plaintiff could not recover, but by confining Glasscock and Orear's patent to the courses and distances on the western boundary, in disregard of the actual boundary alluded to and described in the plat and certificate of survey, which the evidence adduced by the defendant did conduce to prove, as being at 20, 21, 22, 23. And by an attentive examination of the manner in which the judge ruled the motion for instructions, it does appear, that he did give the opinion and direction, that unless the courses and distances from the corner at 1, (the beginning named in the patent,) when reversed would lead to the corners at 21 and 22, the patent did not extend to them, notwithstanding the jury should believe those to have been the marked corners alluded to in the patent. And in so doing, he did go upon the erroneous doctrine that the actual boundaries described and alluded to, in the plat and certificate of survey, on which Glasscock and Orear's patent was founded, should not prevail; over the distances called for. In effect, the judge confined the patent to the short distance, instead of to the actual boundary made and intended

to be described, of which description, distance was but part, and was imperfect and mistaken.

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vs.
EVETT's les-
see.

It seems to this court, that the circuit judge erred in refusing the instructions asked, and in annexing the qualification as to the distance, as stated in the bill of exceptions. It is, therefore, considered by the court, that the judgment of the circuit court be reversed, and that the case be remanded, for a *venire facias de novo*.

The appellant to recover his costs.

Breck and Hanson for appellant; *Caperton* for appellee.

Collins vs. Secreh.

CHANCERY.

Appeal from the Grant Circuit; WM. O. BROWN, Judge.

Case 68.

Usury. Bank note contracts.

Chief Justice BISS delivered the opinion of the court.

June 12.

COLLINS exhibited his bill to be relieved against a judgment at law, obtained against him, upon a note for \$120, besides interest and costs; because the note was given on an usurious lending and borrowing.

Facts of the case, appearing in the pleadings and proofs.

The answer admits, that on the 31st August, 1822, Secreh lent Collins one hundred dollars of commonwealth bank notes, then as the answer says, worth from sixty-two and an half to seventy five cents in the dollar; that for the loan thereof for one year, a premium of twenty dollars was agreed for, and thereupon the note for one hundred and twenty dollars, dated 31st August, 1822, payable the 31st August, 1823, was drawn and executed by Collins, upon which the judgment at law has been obtained for that sum, with interest from the 31st of August, 1823, till paid in gold or silver.

It appears in proof, that when this note fell due, the notes were worth only fifty cents to the dollar. The bill charges, and the answer acknowledges, that the loan was only of or for the sum of 100 dollars in notes of the bank of the commonwealth; but

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SECREH.

the defendant insists now upon the note as for gold and silver, and he says that the complainant himself wrote the note, and executed it with his eyes open; that he would not have accepted the note if made payable in commonwealth's notes, and that there is no fraud or mistake.

The circuit court perpetuated the injunction for twenty dollars only, and dissolved it for the residue of the judgment at law, and interest, with ten per cent damages, and that each party to pay his own costs.

Loan of depreciated bank notes, to be repaid at the nominal amount in specie, is usury, and the borrower is bound but for the value of the paper when loaned, with legal interest.

The defendant has yielded, and seems willing to give up the smaller usury of twenty dollars, but insists on the greater usury of converting the depreciated paper lent, into gold and silver at par, with legal interest thereon. There is an obliquity of mind or a want of thought, after admitting the loan for depreciated paper upon a premium of twenty dollars, to urge an agreement for gold and silver for \$120, to insist on the note as for gold and silver, and yet argue that in all this there is no usury above twenty dollars.

It seems to this court that the agreement to lend paper of the value of sixty two and an half or seventy cents only to the dollar, to be repaid dollar for dollar, in one year, in gold and silver, was usurious; and the additional agreement for the further sum of twenty dollars, was usury upon usury; and this court is further of opinion, that the judgment at law ought to stand as security only for the sum lent, but with legal interest thereon from the time of the loan till paid; that the court ought to have referred the case to an auditor, to take an account, and report what was the value of the notes of the bank of the commonwealth at the date of the note, which is acknowledged to be the time of the loan, with legal interest thereon until the note fell due, and for that sum and the running interest on it until paid, the plaintiff should have been permitted to proceed on his judgment, together with the costs at law—for the excess, the judgment should have been perpetually enjoined: the defendant in chancery ought to have been decreed to pay the costs in chancery.

It is therefore ordered and decreed, that the decree of the circuit court be reversed, and that the case be remanded to the circuit court, that a decree may be framed according to the principles of this opinion.

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And it is further ordered and decreed, that the defendant pay to the complainant his costs in this court in this behalf expended.

Payne for appellant.

Chaplin &c. vs Simmons' heirs.

CHANCERY.

Error to the Bullitt Circuit; PAUL I. BOOKER, Judge.

CASE 69.

*Dower. Executors and administrators. Husband and wife.
Slaves. Hire. Infants. Guardians and wards.*

Judge OWSLEY delivered the Opinion of the Court.

June 12.

RICHARD SIMMONS^a having departed this life intestate, administration of his estate was granted by the county court of Bullitt, to his widow, Sophia Simmons, who, together with Cephas and Jonathan Simmons, her sureties, executed bond as required by law.

Case stated.

Some two or three years after the death of the intestate, his widow married James Chaplin, who, together with his wife, occupied and enjoyed the mansion house and plantation of the intestate Simmons, until his wife afterwards departed this life, without her dower ever having been assigned her.

Before her marriage with Chaplin, the widow Simmons, as administratrix of the estate of her husband Simmons, caused an inventory to be taken, and sale made, of the intestate's estate, omitting however to sell a negro woman that belonged to the estate.

That negro she retained in her possession until her marriage with Chaplin, who thereafter had the use of her services until he sold her for the price of two hundred and fifty dollars.

At the time of his death, the intestate, Simmons,
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CHAPLIN & C. had several children, and his wife was afterwards delivered of another. These children all continued to reside with their mother during her life time, and were infants at the commencement of this suit, and may be still so.

vs.
SIMMONS' h's.

Bill by Simmons' heirs.

To obtain an account of the personal estate, as well as to recover the value of the negro woman, and pay for her services, and rent for the plantation of which Chaplin has had the use, this suit in chancery was brought, in the name of the children of the intestate Simmons, by their next friend, John Purcell, against Cephas and Jonathan Simmons, the sureties of the administratrix, and her surviving husband, James Chaplin.

Decree of the circuit court.

After the accounts were stated by a commissioner, in a manner directed by the court, a decree was pronounced for four hundred and eighty one dollars and eight cents, against the defendants in the circuit court, jointly, that being the balance adjudged against them, after allowing all credits to which they were considered by the court to be entitled.

It is quite evident, that in fixing on the amount decreed, the court must have departed from those principles of law and rules of equity, by which it should have been governed in deciding on the contested rights and liabilities of the parties. But as the cause must again return to the circuit court for further proceedings, it is thought to be unnecessary to scrutinize minutely, the various items contained in the account reported by the commissioner, or to do more than decide the principles by which that court is to be guided, upon the return of the cause, in its further adjustment of the accounts, and ultimate decree.

Widow is entitled to the mansion house and the whole plantation, rent free, till her dower is assigned her.

And in the first place, we would remark that the extent of liability is not precisely the same in all of the defendants in the circuit court. As respects the claim of the complainants for rent, there is no difference. The rent is claimed for the use of a plantation, which the widow of the intestate Simmons had the undoubted right to possess, and enjoy, rent free, until her dower was assigned her; and as there never

was any assignment made of her dower, there is no pretext for charging either defendant for the use of the plantation during her life; and we understand the object of the bill, as respects the claim for rent, to be for the rent which accrued during the life of the mother of the complainants, who was the widow of the intestate.

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With respect to the claim set up in the bill, as to the negro woman and personal estate, the liability of the defendants, Cephas and Jonathan Simmons, is no doubt co-extensive with the right to which the complainants have shewn themselves to be entitled to recover. Those defendants are the sureties in the bond which was given by the administratrix for a faithful discharge of her official duties; and in the discharge of those duties, it was as much incumbent upon the administratrix to guard the interest of the distributees, as respects the negro woman which came to her possession, as any of the personal estate which came to her hands to be administered, so that for any abuse of her official conduct, either in omitting to hire out the negro, or in selling her, whether that abuse arose before or after the marriage of the administratrix to Chaplin, or whether the abuse arose from her own voluntary act, or the act of her husband, the sureties in the official bond are equally liable to the complainants.

An administratrix and her sureties are liable to the distributees for omission to hire out slaves, & for the sale of slaves made by her after-married husband, with or without her consent.

But the liability of the husband Chaplin, is not measured by the same broad rule of right in the complainants. He is, no doubt, liable to account for whatever of the personal estate of the intestate was held by the administratrix in her official character at the time of his marriage, as well as for any abuse of official duty, either in omitting to hire the negro, or in selling her after his marriage. Upon his marriage, it devolved upon him to act in relation to the negro and personal estate of the intestate, of which his wife was then in her official capacity possessed, as would have been incumbent upon his wife, as administratrix, to have acted if she had remained sole and unmarried; and for not having done so, he is as much bound to the distributees of the intestate as if he had been the lawfully ap-

After-married husband of an administratrix, is liable, even after her death, for whatever of intestate's goods remained in her hands at the marriage, and on all causes of action accruing during the coverture.

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Otherwise as to the liabilities she had incurred before the coverture, for then he is liable only in case of a recovery against him before her death.

pointed administrator. His liability arose from his own acts and conduct, and must be considered as still continuing, though his wife is dead.

But not so as to the personal estate of the intestate, which was received by his wife the administratrix, but which was not held by her in that capacity at the time of her marriage with him. He no doubt, by his marriage, became responsible for all her existing liabilities, whether those liabilities arose out of her official acts or otherwise; but it was a responsibility cast upon him by construction of law, and did not continue, and cannot be enforced after the death of his wife.

This difference of liability between the defendants, it will be necessary for the circuit court to regard and observe, in the decree which it may be proper to make, when the cause goes back to that court.

Subject to this difference of liability between the defendants, the amount which the complainants are entitled to recover, is easily ascertained.

A charge in their favor should first be made for the whole of the personal estate; and from that amount should be deducted whatever has been paid for the funeral charges, and other legal expenses in the administration of the estate, together with the debts which were owing by the intestate. After making this deduction, and after subtracting from the balance one third thereof for the widow's distributive share, the remainder will be the amount of the personal estate for which the complainants are entitled to a decree.

The distributees being infants, and having resided with their mother, the adm'r, no interest on their distributive shares allowed.

We have omitted to say any thing as to interest on the amount; and we have done so, because the complainants are all infants, and have been maintained by the administratrix, and there has never been any person to whom payment could legally have been made by the administratrix, of their distributive shares; and because, under such circumstances, the complainants are understood to have no legal claim for interest.

To the amount of personal estate so ascertained,

should be added, in favor of the complainants, the value of the negro woman which has been sold, and also her annual hire from the intestate's death, after deducting from the hire, up to the death of the administratrix, a reasonable commission for services in the administration, and one third of the balance for the interest to which, as widow, the administratrix was entitled.

Before, however, any addition in favor of the complainants is made on account of the hire of the negro, an estimate should be made of a reasonable allowance for educating and boarding the complainants respectively; but in estimating the value of boarding, the account against neither of the complainants should be brought down further than to the time of their being respectively able, by ordinary and proper labour to pay for their board.

After the estimate is so made, the amount charged to each should be made to sink so much of their respective interests in the hire of the negro, but the interests of neither in the hire should abate more than the amount separately chargeable to them, and none of the complainants should be made liable for boarding or other expenses beyond their respective interests in the hire. The hire of the negro must be brought down to the time of taking the account, and the value of the negro must be estimated as of that time.

The decree must be reversed with costs, the cause remanded to the court below, and such proceedings, orders and decrees there made, as may not be inconsistent with the principles of this opinion.

Rudd for plaintiffs; *Chapeze* for defendants.

Graves vs. Moore & Burton.

Error to the Lawrence Circuit; SILAS W. ROBBINS, Judge.

Evidence. Erased credits. Onus probandi.

Judge Owsley delivered the opinion of the court.

THIS writ of error is prosecuted to reverse a judgment recovered by Moore and Burton,

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SIMMONS' h's.

Adm'x who unnecessarily sells a slave, shall account for the value of the slave, and also the hire up to the time of the distribution.

Infant children may be charged the amount of the hire of a slave administratrix had unnecessarily sold, and for which she accounts for their maintenance, but no part of the principal shall be sunk.

Infants shall not be charged for maintenance after they are able to maintain themselves.

APPEAL TO
THE CIR. C.
Case 70.

June 12.

Question stated.

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vs.
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on the trial in the circuit court, of an appeal, which was prayed by them, from a decision of a justice, on a warrant brought by them against Graves.

Credit on the
note sued on
erased.

The matter in contest relates exclusively to a credit for twenty dollars, which Graves contends was paid by him to Moore, and which he insists was once endorsed upon the note sued on, but afterwards, without his assent, was erased from the note by Moore.

Evidence of
payment.

On the trial, which was had in the circuit court without pleadings in writing, after the note was read to the jury, an endorsement thereon, was, also read, in the following words: "Cr. by cash rec'd \$20 00 c. July 16, 1823." But the endorsement appeared to have been obliterated by drawing a pen through it, and under it was written in the hand writing of Moore, these words: "he would not have it on his note." A witness by the name of Sellard was introduced, who proved that sometime in 1823, (but the particular time he could not name,) he thinks on a court day, he heard Moore apply to Graves for the loan of a sum of money, perhaps ten or fifteen dollars; that Graves immediately drew from his pocket a roll of paper and gave Moore, he thinks, two bills, the amount of which he knew not, nor could he say what sort of bank paper, not having inspected the notes; and that after having received the bills Moore asked Graves whether he was willing to have the amount of the bills credited on his note, to which Graves replied he had no objection, and thereupon the parties separated.

Instructions
of the circuit
judge.

After the evidence was all gone through, a motion was made by the counsel of Moore and Burton, to exclude from the jury the testimony of the witness Sellard; but the motion was opposed by the counsel of Graves, and in turn, he moved the court to instruct the jury, that as the credit for twenty dollars appeared to have been once upon the note, though afterwards erased, it devolved upon Moore, the holder of the note, to prove that the erasure was rightfully made.

The court refused the instruction which was ask-

ed by Graves, and excluded the testimony of the witness on the motion of Moore and Burton.

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The decision is not approved on either point. The objection to the excluded testimony seems to have been taken on the ground of its irrelevancy to the point in contest, and if it were so, we should have no hesitation in sustaining the decision which went to exclude it. But it requires no effort of the mind to discover, that the testimony was well calculated to prove that the credit which had been entered upon the note, was placed there not only in conformity to payment actually received by Moore, but by the approbation of Graves; and if so, none will doubt the materiality of the testimony to illustrate the contested fact of payment. It is no objection to the testimony that the same facts which it went to establish, might have been inferred from the indorsed credit upon the note, for that credit had afterwards been erased by Moore, under the pretext of its having been applied without the assent and against the will of Graves; and the testimony, whilst it went to fortify the inference deducible from the endorsement itself, also goes to repel the pretext assigned by Moore for erasing the credit. The testimony was not, therefore, irrelevant, and should not have been excluded from the jury.

Evidence of a witness, conducing to prove the payment of the money mentioned in the entry of the erased credit on the note paid upon, and the direction of the payor to thus appropriate it, held competent.

But, were it even admitted, that the testimony was properly excluded, still we should be of opinion that the instruction which was asked by Graves, should have been given to the jury. The credit which was endorsed upon the note, by Moore, is undoubtedly equivalent to an admission, by him, that so much as was credited had been paid, and there is no principle of evidence which will allow a person, after he has admitted a fact, even if the admission be by parol and not in writing, to do away the force of the admission by an after denial, or withdrawal of it. Though it be afterwards denied, if it were by parol only, or if it be in writing, though it be afterwards erased or obliterated, the admission is, nevertheless, evidence against the person making it, and is entitled to all the weight, of evidence of that sort, until explained away or disproved by him.

An entry of credit once made on a note, but afterwards erased, is evidence, and will entitle the obligor to the benefit of it, unless disproved or explained off.

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MOORE &c.

The result is, that the judgment must be reversed with cost, the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

McConnell for plaintiff; *Triplett* for defendants.

CHANCERY.

Aldridge vs. Birney &c.

CASE 71.

Error to the Garrard Circuit; JOHN L. BRIDGES Judge.

Set off in equity. Parties in chancery. Damages. Jury. Practice.

JUNE 12.

Judge MILLS, delivered the Opinion of the Court.

ON the 17th February, 1800, John Aldridge executed to Miller Wood the following instrument of writing:

Aldridge's obligation to Wood, assigned to Birney, and judgment at law recovered.

"I promise to pay Miller Wood, eleven pounds one shilling and six pence, in either merchandise or whiskey at 3s. 9d. per gallon, on or before the first day of July next, for value received. Witness my hand and seal the 17th Feb. 1800."

(Signed) *John Aldridge*, [SEAL.]

This writing Wood assigned to a certain Willick, who assigned it to Elisha Freeman, who assigned it to James Aldridge, who assigned it to Stephen Pirkins, who assigned it to James Birney, who brought his action at law thereon, and recovered judgment against the obligor.

Aldridge's bill in equity for injunction against the judgment.

To be relieved against this judgment, John Aldridge filed this bill in equity, shewing, that on the same day of the execution of his bond to Wood, Wood executed his obligation to him (Aldridge) to the following effect:

"Under the penalty of one hundred pounds, I oblige myself, my heirs, &c. to do or cause to be done, the following work, to the house in Lancaster, on lot No. 10, to-wit: hue and put up one other set of logs, and to be of white oak, and finish the roof in a good and workmanlike manner. The logs above to be hued three sides. Also to furnish five hundred and fifty feet of good sound flooring plank, and do

fifty dollars worth of mason work on said house, should the said mason work that is necessary for said house not amount to fifty dollars, said Wood is to pay the balance in cattle, and if more, said Aldridge is to pay it in cattle, said carpenters work shall be done by the last of March. Witness my hand and seal, this 17th of February, 1800.

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(Signed)

Miller Wood."

He charges this writing was given in consideration of the first, or that one constituted the consideration of the other, so far as the first extends; and that Wood violated his covenant in every particular, and performed no part, and even sold part of the materials belonging to Aldridge at the building, before his departure from the state, and that he had departed and left no remedy to Aldridge to recover for his breaches and failures; the amount of which he claims as a discount against the note held by Birney.

Birney answered declaring his ignorance of the equity set up and requiring proof. Wood never answered, but order of publication was made against him.

Birney's answer.

The court below dismissed the bill of Aldridge, with costs and damages.

Decree of the circuit judge.

It appears in proof, that Aldridge had bought lot No. 10, of Wood, and Wood had stipulated to do the work contained in his bond to Aldridge, on the lot; and that he had wholly failed to do it before he departed from the country. It is evident, from the date of the two writings, that one did form part of the consideration of the other; that is, that the writing given by Aldridge did form a part of the consideration of that given by Wood to Aldridge.

Where one obligation forms the consideration of another, and one of the parties, without performing, removes from the state, having assigned off the obligation to him, the other party may be relieved in equity against a judgment recovered by the assignee.

Under these circumstances, we do not doubt the failure of Wood to perform his covenant, did give to Aldridge an equity which would follow his own obligation into the hands of Birney. It is true that the claims of Aldridge, or his obligation upon Wood, for the breaches thereof, are of a legal character, and such as form a cause of action peculiarly proper for a court of law. But Wood, by leaving

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the country, put any legal remedy out of the power of Aldridge; and as one instrument formed the consideration of the other, it was competent for the chancellor to ascertain by a jury, the quantum of damages, or the value of the defalcation of Wood. *Baylor vs. Morrison*, 2 Bibb, 103.

In the bill in such case, it is not necessary to make the original obligee against whom the complainant sets up the obligation he relies on for set-off, a party; but you may proceed without him, as in case the set-off had been pleaded at law.

But a difficulty here, occurs with regard to parties to the contest. Wood is named as a defendant in the bill, and an order of publication was made against him, and there is a formal certificate by the printer, that the order was inserted for two months; but it is evident from said certificate, that part of those weekly insertions was after the day of appearance named in the order. The publication was commenced too late, to have two months left before the appearance day, and the editor continued the publication afterwards to complete the requisite length of time. Of course Wood could not be treated as a party before the court at the hearing. The question then arises, was he a necessary party? If he was, then no decree on the merits ought to have been rendered. The chancellor ought to have dismissed the bill for the want of proper parties, without prejudice, or to have directed the proper parties to be made in a reasonable time, and to direct the bill to be dismissed, because the new party or parties were not made or brought in, at the end of that period. On the contrary, if Wood was not a necessary party, then the chancellor might have decreed upon the merits, as he has done, without him.

Wood was the assignor of the note or obligation held by Birney, and as that assignment passed the legal title of the note, it was not necessary that Wood should be a party, for the mere purpose of contesting that note according to previous decisions. The same principle, we conceive, dispenses with Wood as a necessary party, notwithstanding there is still another obligation upon him, held by Aldridge, to be settled in this action. If the note held by Aldridge, was for a liquidated demand, and could have been pleaded as a set off at law, Aldridge could have made that plea in the common law action; and allowing him to set up and liquidate the amount, and

claim it as a discount against Birney in chancery, without making Wood a party, is permitting him to do no more, than he could be allowed to do at common law. Wood, therefore, is not a necessary party; and although there was an attempt to publish against him, yet, as that publication was not properly made, we cannot suppose the complainant, Aldridge, in a worse situation, with his defective publication, than he would have been had he never named Wood as a party in his bill. It was proper, therefore, that the chancellor should decree upon the merits, disregarding Wood, as no party.

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We cannot doubt, that one of these notes is the consideration for the other. They were of the same date, and witnessed by the same witness, and unless something on their face forbids the conclusion or some other proof is adduced to the contrary, the presumption is, that one forms the consideration of the other.

Date and
subscribing
witnesses be-
ing the same,
are sufficient,
without any
other evi-
dence, to
prove one ob-
ligation was
the condition
of the other.

The court below ought, therefore, to have given to Aldridge the relief desired. A jury ought to be empannelled to ascertain the real injury or damages sustained by Aldridge, and on account of the failure of Wood to comply with this contract; these damages ought to be set off and discounted against the judgment held by Birney, even to the full amount, if they shall be so much when ascertained. If there be more, as Wood is no party, no decree for the overplus can be rendered.

Assessment
of damages
in chancery.

The decree must be reversed with costs, and the cause be remanded, with directions for such proceedings to be had and decree to be rendered, as shall conform to this opinion and the rules of equity.

Decree and
mandate.

PETITION FOR A RE-HEARING BY J. J. MARSHALL.

THE defendant in error, by his counsel, respectfully submits to the court the following petition for a re-hearing:

The sum involved is matter of no consideration. Were it not that a principle appears to be assumed which is important, and a rule of belief established,

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VS.
BIRNEY & Co.

Petition for
re-hearing.

which may have extensive influence, the court would not be troubled. The coincidence in the dates of Aldridge's bond to Wood, for £11. 1s. 6d, and of the covenant of Wood, to perform certain work for Aldridge, is affirmed by the court to be sufficient evidence, that the one was in part consideration of the other: that is, "that the writing given by Aldridge did form a part of the consideration of that given by Wood to Aldridge." When the consideration of a writing is impeached, it is incumbent upon the party to make good his allegation. To this end, it is essential to shew, by competent and satisfactory proof, the consideration upon which the instrument intended to be assailed was founded that done, the failure in whole or in part of that consideration, its turpitude or illegality, the fraud or the mistake, must be proved. Coincidence in dates, is certainly not opposed to the conclusion, that one covenant is executed in consideration of another; it is even conceded that it is a circumstance propitious to such conclusion, and in conjunction with other facts, conducing to sustain such allegation, may itself conduce to that end. But, in the absence of other proof, it certainly appears totally inadequate to constitute the basis of any judicial conclusion. Coincidence in dates is but the absence of an obstacle to a conclusion which could not be drawn, without accounting for a difference in dates, did such difference exist. It is as inconclusive a circumstance as could attend transactions, or written instruments, alleged to have grown out of and to be dependent upon each other. What limit is there to transactions, on the same day, between the same parties? None except their own will. The law has imposed no restriction to a single contract. Nature has imposed no physical barrier.

This case is not supposed to depend upon the principle of set off, whether legal or equitable. The equity of Aldridge, if any, results from the failure of consideration. He pleads at law a good plea, setting forth the covenant of Wood, alleging it to be the consideration of his bond, and that there was a total failure; that he was dead and insolvent; and had no legal representative. We will admit the plea

good. Issue is joined upon it. That Wood had not performed the stipulations in his covenant, that he was dead and insolvent, and had no legal representative, are made out satisfactorily; but there is no proof that Wood's covenant was the consideration upon which Aldridge's bond was executed, except the coincidence in dates and the fact of attestation, by the same witness. Can it be said that a jury, under the penalty of their oaths, could find for the defendant? Is mere coincidence in dates sufficient to authorize such a verdict? Can such coincidence throw the burden of proof upon the plaintiff? Must the plaintiff prove that the covenant was not the consideration upon which the other was executed? Is he compelled to lose his case unless he can find out some other consideration, upon which to rest his cause of action? Is it not the law, (and does not the chancellor follow the law,) that he who impeaches or questions the consideration of any writing under seal, or of any which has been, by statute, placed upon the same footing, must not only do it upon oath, but must, in order to success, prove that this consideration has failed, or is vicious? Coincidence in dates cannot furnish that proof, even though the instrument which is offered, should upon its face, bear evidence, that itself could not form the consideration of any contract.

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The bond from Aldridge to Wood does not refer to any consideration future and to be performed. The covenant from Wood to Aldridge has no indication of the existence of any consideration not already received. Instead of the attestation of the two papers by the same witness, constituting any reason for supposing the one to be consequent upon the other, under the circumstances of this case, the reverse would seem to be the rational conclusion. Aldridge was bound to have supported his bill to reasonable intent, and to have furnished the discretion of the chancellor, competent and satisfactory testimony, to justify the conclusion, that the one covenant was the consideration of the other. He has neither taken the deposition of the subscribing witness, nor accounted for not doing so. The execution of the instruments is not questioned it is true; but who might

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more naturally be expected to know whether two papers were executed at the same instant of time, and upon the same consideration, than he who was the witness to the execution of each? The parties and the witness, certainly, may be supposed to know more in relation to a contract, than any other. Had this witness been summoned, he might have proved a different consideration. His testimony was open to the defendant in chancery. But the defendant could not suppose himself required to make proof of the negative of a proposition.

Proof of the sale of real estate must depend upon writing, and there is no evidence of the sale of lot No. 10 by Wood to Aldridge. But admit that the parol testimony is sufficient, thus incidentally given, to establish the fact of a sale. Does not that proof weaken the inference drawn from the coincidence in dates, between the bond of Aldridge and the covenant of Wood, by shewing that the parties had actually entered into more contracts than one.

The internal evidence of the two instruments is certainly hostile to any supposition that one was in consideration of the other. The sum of the one is no measure of the value of the other. But if Aldridge's bond were the consideration, in part, of Wood's covenant, why is the stipulation relative to the cattle? If the mason's work exceeded fifty dollars, Aldridge was to pay the difference in cattle, if it fell short, Wood was, in like manner, to make up the difference. Wood was to perform his work by the last of March, or that not to be done by the last of March, was to be performed on demand. Aldridge was to pay the merchandise, or whiskey, in July. It would seem more natural that Aldridge should have claimed a credit upon his bond, than that he should introduce a new subject, were there a deficiency in the mason's work.

This case depends entirely upon a question of fact: was the bond of Aldridge to Wood executed in consideration, in whole or in part, of the covenant from Wood to Aldridge? That coincidence in dates is not, of itself, satisfactory evidence to every mind, that one instrument is the consideration of another,

is manifest from the decision of the circuit judge. If coincidence in dates, be sufficient evidence of the connexion and dependence of one covenant upon another, without the proof of any fact to shew that dependence and connexion, the ultimate opinion of the court is not controverted; although it is thought just as reasonable, to send Aldridge after his friend, Miller Wood, as to despatch a stranger. All that is desired, is to ascertain whether coincidence in dates, is *ipso facto* and *per se*, in the absence of contradicting evidence, sufficient to support the allegation and to establish the conclusion, that one covenant, or instrument in writing, was executed and delivered, in consideration of the covenants contained in another instrument in writing.

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All which, is respectfully submitted, to induce the court to re-consider the opinion delivered.

THE COURT overruled the petition.

Anderson for plaintiff; *Marshall* for defendants.

Dunn's heirs vs. Pigman's heirs.

CHANCERY.

Appeal from the Fayette Circuit; JESSE BLEDSOE, Judge.

Case 72.

Fraud. Specific performance.

Judge OWSLEY delivered the Opinion of the Court.

June 13.

To obtain the legal title to a tract of land, of which they were possessed, and for which judgment in an action of ejectment had been recovered against them, the heirs of Dunn exhibited their bill in equity, with injunction, against the ancestor of the defendant in error, in his life time, and others. The ancestor died pending the suit, and it was revived in the name of his heirs at law, who are the defendants in error.

The legal title to the land is admitted, by both parties, to have been granted by the commonwealth of Virginia to Jesse Pigman, who afterwards conveyed the same to his son, from whom the defendants in error received the title by descent, as his heirs at law, and under the title so derived, the judgment at law was recovered in the action of ejectment.

Legal title of
the land.

DUNN's heirs
vs.
PIGMAN's heirs.

Grounds of
the claim of
the heirs of
Dunn.

The heirs of Dunn claim the equitable right to the land: First, under two sales which they allege to have been made by a sheriff for different parts of the land, one of which, they charge, was made under an execution that issued on a judgment, recovered at law, by a certain Joseph Boswell, against the heirs of the son of Jesse Pigman, to whom he had conveyed the land; and the other under a decree pronounced in favor of the ancestor of the complainants, against the same heirs

Secondly, under a bond which was given by Jesse Pigman to John Lucas, dated the 25th of April, 1787, for five hundred acres of land, and by various successive assignments, was ultimately transferred to their ancestor, James Dunn, in his lifetime.

Answers.

The equity claimed by the complainants, is contested by the defendants in error, and proof required of every fact necessary to authorize a decree for relief.

Decree dismissing the bill, without prejudice at law.

On hearing, the bill was dismissed, without prejudice to the right of the complainant to sue at law, upon the bond which was given by Jesse Pigman to Lucas, for the five hundred acres of land.

Claim, on the ground of the purchasers at sheriff's sale, denounced for their fraud.

With respect to the equity first claimed by the complainants, there is evidently no pretext for the relief prayed in their bill. Without entering upon a particular examination of the evidence which has a bearing on the sheriff's sales, through which the complainants claim the land, it is sufficient to remark, that instead of establishing any right under either sale, the evidence goes abundantly to shew, that in justice, nothing was due from the ancestor of the heirs against whom the judgment and decree were recovered, either to Boswell, in whose name the action at law was prosecuted, for the benefit of the ancestor of the complainants, or to Dunn, the ancestor in whose name the decree was rendered; and that, in his attempt, through the instrumentality of the court and its officer, to deprive the infant heirs of Pigman of their inheritance, the conduct of the ancestor of the complainants deserves the most pointed animadversion and reprobation of the chancellor.

Nor are we of opinion, that the claim secondly set up through the bond given by John Pigman to Lucas, deserves, under all the circumstances with which it is connected, a more favorable consideration for the complainants. The attempt to recover the land under sales so unjust and iniquitous as those made by the sheriff are proved to be, though not in itself conclusive against the right of the complainants to relief under the claim secondly set up and relied on by them, is in no slight degree calculated to excite suspicions against the justice and obligatory force of the bond of Pigman to Lucas, through which that claim is made; and instead of being dissipated by any thing else in the cause, those suspicions deserve additional strength and confirmation from the depositions and exhibits contained in the record.

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vs.
FIGMAN's h's.

Influence of the fraud manifest in one ground of complainants claim, upon his other grounds.

For the bond not only purports to have been executed upwards of thirty years before the commencement of this suit, but it is proved not to have been assigned by Craig, to whom Lucas, the obligee, had transferred it, until after he had failed to succeed in a suit which he brought against Pigman upon it, and the assignment which was then made by Craig to Barkley, who afterwards assigned it to the ancestor of the complainants, is proved to have been made without the payment of any thing by Barkley; and although it is proved that something like two hundred dollars was advanced by Dunn, the ancestor of the complainants, for the bond, it is distinctly shown in evidence, that after he had received the assignment, Dunn acknowledged that he had obtained the bond for the benefit of the heirs of Pigman.

Stale and suspicious claim asserted in equity: complainant sent to law.

Under these circumstances, we have no hesitation in saying, that the complainants have no cause to complain of the decree which refused a specific execution of the bond, and left them at liberty to sue at law thereon.

Decree affirmed.

The decree is affirmed, with cost.

Wickliffe for appellants; *Haggin, Chinn, and Crittenden* for appellees.

CHANCERY.

Burnham & Co. vs. Gentrys.

Case 73.

Error to the Madison Circuit Court; GEO. SHANNON, Judge.

Usury. Penal bonds. Statutes. Equity.

June 13.

Judge OWSLEY delivered the Opinion of the Court.

THE GENTRYs borrowed of Burnham & Co. one thousand dollars in notes of the Bank of the Commonwealth, and in consideration thereof executed the following obligation:

On or before the first day of March next, we jointly and severally bind ourselves to pay Thompson Burnham & Co. at their store in Richmond, Ky. one thousand dollars, with legal interest from the date, which may be discharged in notes on the Bank of Kentucky or its branches; value received. Witness our hand and seal this 1st Oct. 1821.

*James H. Gentry, [Seal.]**David Gentry, [Seal.]*

Suit was brought upon this obligation at law, by Burnham & Co. and judgment was thereafter confessed by the Gentrys, for one thousand dollars, with interest and cost.

To be relieved against so much of the judgment as exceeds the value of one thousand dollars in Commonwealth Bank paper, and interest thereon, the Gentrys exhibited their bill in equity, with injunction; and on a final hearing, the circuit court perpetuated the injunction against the judgment, for thirty three hundredths thereof, that being the excess above the value in gold and silver, of the one thousand dollars Commonwealth's Bank paper, received by the Gentrys from Burnham & Co.

Loan of depreciated bank notes, to be repaid at par in lawful money with legal interest, is usury.

In whatever point of view the obligation of the Gentrys may be considered, the result will be equally favourable for them. If it be considered as a device resorted to by Burnham & Co. to evade the statute against usury, and the obligation be treated as usurious, it is perfectly clear, that notwithstanding the confession of judgment, the Gentrys, under the law of this country, had a right to resort to a court of equity to be relieved against the usurious interest, and the relief which was decreed is not greater

than, according to the evidence, it should have been, supposing the contract to be usurious.

BURNHAM
& Co.

VL

GENTRYS.

Obligor in a penal bond may confess judgment, and then resort to equity for relief against all above what ought to have been assessed for a breach of the condition.

But if, as the obligation might have been discharged by the Gentrys against the day named therein by the payment of bank paper, the contract be not understood to be usurious, but is considered in the light of a penal bill it is equally clear, that the Gentrys had a right to apply to a court of equity to be relieved against the penalty for which the judgment was confessed. Their right to do so could not be seriously doubted, were it even conceded that they might, by defending the action at law, have prevented a recovery for more than the value of the bank paper by which the obligation might have been discharged. For at common law, after a breach of the condition of a penal bill there was no allowable defence by which, in an action for the penalty, the amount of recovery might be reduced below the penalty to the value of the thing mentioned in the condition, and if in such an action the amount of recovery may now be reduced below the penalty, and measured by the value of the thing mentioned in the condition, it must be by an equitable and liberal construction of the provisions of the statute, which requires the assignment of breaches by plaintiffs in actions upon bonds, with collateral conditions; so that the failure of the Gentrys to make the defence at law, cannot have precluded them from applying for relief to a court of equity, whose power to relieve against such penalties has been immemorially acknowledged, and whose jurisdiction in like cases is not admitted to have been taken away by the act alluded to, unless by defence at law the same matter be there drawn in question.

The decree is affirmed, with costs.

Breck for plaintiffs; *Turner and Caperton* for defendants.

PETITION &
SUMMONS.

Case 74.

Offutt vs. Ayres.

Appeal from the Fayette Circuit; JESSE BLEDSOE, Judge.

Principal and Agent. Construction. Obligation.

June 13.

Judge MILLS delivered the opinion of the court.

THIS is a summons and petition against Benjamin Ayres, on the following note:

Note declared
on.

"On the twenty fifth of December, eighteen hundred and twenty five, I promise to pay S. Offutt one hundred and fourteen dollars, for the hire of Harry.

For B. Ayres,

Lex. Feb. 28, 1825

W. B. Ayres."

Demurrer to
to declaration,
and
judgment for
defendant.

There was a demurrer to the petition, and that demurrer was sustained by the court below, and judgment rendered for the defendant, from which the plaintiff has appealed.

Question
stated, whose
is the note?

The question is, is this note to be taken on its face as the note of B. Ayres, or W. B. Ayres? If of the former, the judgment is wrong—if the latter the judgment is right.

Whether W. B. Ayres was or was not the agent of B. Ayers, is not material. If he was not the agent, then there could be no question that he alone is bound in the note. If he was the agent, it was competent for him to interpose his own credit and deal upon it, while dealing for his principal; and the question then turns upon the meaning of the instrument. On whom does it impose the obligation, on the principal or the agent.

A note in these words:
"I promise to pay S. O. \$114, signed, for B. A. by W. B. A." is not an obligation of B. A. but on W. B. A.

Upon the letter of the instrument there can be no doubt. According to its grammatical import, it is the undertaking of W. B. Ayers. His signature to the note is in the same case, with the pronoun, "I," which precedes; and "I," is nominative to the verb "promise." Transpose the words as we please, the same meaning follows their letter. If the note read, "I, W. B. Ayres, promise to pay for B. Ayres" the sense would have been so striking, that there could not have been any dispute, without violence to the letter; and yet the order in which the words are placed, leaves the sense the same, and places every noun and verb in the same case, and mode and tense,

in which they would stand in the way supposed. The position only makes the sentence a little more obscure.

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It may be said, that the note is an inaccurate way of executing an authority, and that it is so customary, as to demand of the court a construction of the words different from their proper meaning. It is true, that instances may be found, where the meaning of a word is changed by its popular use, so far from the proper sense, that to effectuate the intention of the parties in the use of it, courts have adopted the popular acceptance. But this doctrine ought not to be carried to the extent of changing grammatical construction, and transposing nominatives, and placing one case of nouns for another. To do this, it is necessary to aver and prove mistake or fraud, in order to change the instrument itself. Until this is done, he who has undertaken, or "promised," must be left bound by that undertaking, or promise; and it would be erroneous to release him from the literal and proper meaning of his undertaking.

With this accords the cases of McBean vs. Morrison, 1 Marsh. 545; and Duval vs. Craig, 2 Wheat. 56-7.

The judgment, the Chief Justice dissenting, must be affirmed, with costs.

Dissent of Chief Justice BIBB.

OFFUTT sued by petition and summons, and "states that he holds a note on the defendant, Benjamin Ayres, in substance, as followeth: On the 25th of Dec. 1825, I promise to pay S. Offutt one hundred and fourteen dollars, for the hire of Harry. Lexington, Feb. 28, 1825.

For B. Ayres,

Test, Ezra Offutt.

W. B. Ayres.

Yet the said debt remains unpaid," &c.

The defendant demurred. The court gave judgment for defendant.

Upon the face of the writing, it seems to me to be the note of B. Ayres, executed for him by his agent,

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AYRES.

Dissent by
ch. jus. Bibb.

W. B. Ayres. That such is the genuine, unadulterated meaning of the instrument, my mind perceives as clearly as it is capable of understanding any proposition. This mode of executing a note for the principal by his agent, is plain, compendious, and, from its artless simplicity and clearness, is convenient and in common use. That the writing was intended to signify, and does signify, a promise by B. Ayres, by his note of hand, executed for him by W. B. Ayres, as his agent, is, to my mind, a self evident truth, to be understood at once by inspection. Nor do I deem it necessary to call in any thing more by way of confirmation of a proposition so plain to my view.

The petition states it to be the note of Benjamin Ayres; he has not denied the authority of W. B. Ayres to act for him in that behalf; the demurrer admits the statement in the petition, that it is the note of Benjamin Ayres. If by plea, Benjamin Ayres, had denied that the note was his act, then to have charged him, it would have been necessary to prove the authority of W. B. Ayres. The demurrer does not question the authority of W. B. Ayres to act for Benjamin. But if W. B. Ayres had falsely assumed an agency, when in truth he had not authority to bind Benjamin, then W. B. Ayres would have been personally responsible; not by reason of this or that form by which he called himself agent, but upon the general principle that every one becomes personally responsible for falsely asserting an authority and acting on behalf of another, when in truth and in fact he had not the lawful authority so to act in the name of that other.

My opinion is, that the judgment should have been for the plaintiff, Offutt.

Crittenden and Payne, for appellant; *Mayes and Chinn*, for appellee.

Miller vs. Patrick &c.

Error to the Madison County Court.

MOTION.

7th 359
122 113

Case 75.

Statutes. Processioning of land. Perpetuation of testimony. Notice. County courts. Error.

Judge MILLS delivered the Opinion of the Court.

June 13.

THE defendants in error gave notice, by advertisement, that they would attend, with the processioners appointed by the county court, to procession a tract of land, claimed by them, being a settlement and preemption of 1400 acres, and that they would take depositions at the same time, to establish the lines and corners. A certificate, or report of the proceedings of the processioners was returned, together with a plat, and some depositions which had been taken, to the clerk's office, and the court was applied to, to approve the same, and direct the whole report to be recorded.

Report of the standing processioners of their proceedings, and testimony taken before them, offered to be approved and recorded.

Miller, the plaintiff in error, appeared, and excepted to the report, and objected to its being recorded.

Report excepted to, and motion opposed by plaintiff in error; but report received and recorded.

The court overruled his objections, and approved the report, and ordered it to record; and Miller has prosecuted this writ of error, and assigned sundry errors in the proceedings.

The questions arising are not free from embarrassment of too much legislation. The business of processioning lands, or of perpetuating testimony, might be provided for, in a short compass, and in a few provisions, settling on one, and but one, mode of doing it, instead of numerous provisions and different modes of appointing processioners, and different directions to each set, who should be appointed.

Statutes in relation to the processioning of lands.

The previous question here occurs; had the court itself any thing to do with the report, or was it a matter between the party and the clerk of the court, whether this report should be recorded, or not.

In 1796 the legislature provided for the appointment of three or more commissioners, by warrant issued to them by order of the court. These special commissioners had power to perpetuate testimony, which comprehended the greatest portion of the du-

Special commissioners, to be appointed by the act of 1796, on the party's mo-

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tion, may take testimony, and go around the land, and remark it; but they report only the testimony, and that to the clerk only, not to the court.

Standing processioners appointed by that act, had no power to take testimony.

They could only procession, re-mark and renew the lost boundaries of the land.

Their report had to be approved by the court, and recorded by its order.

Act of 1815 authorized special commissioners to be appointed on the motion of the party, and empowered them to perform all that could be done by both classes of commissioners authorized by the act of '96.

ty assigned. It seems, however, that they might remark and procession the lands, touching the boundaries and calls of which they had taken testimony; and there is no provision relative to their reporting their acts of processioning. All the report these commissioners were to make, was to be made to the clerk, and not the court, and the clerk himself, ruled the whole question of recording.

The same act, however, by a distinct provision, and independent in its terms, in the fifth section thereof, directed the division of each county into districts, and the appointment of processioners, permanently in each. The sole power and duties of these commissioners appear to be, processioning only, or going round, re-marking or renewing the lost boundaries of every person's land, who applied to them and produced his title papers.

They had no power to take testimony.

They were to make a report of their proceedings, or rather to grant a certificate of their doings, which was to be returned to the clerk of the county court, and to be recorded by him, *being first approved by the court.*

Thus stood the law till 1815, when the legislature passed a new act, providing for the appointment of three commissioners by order of court, who were to associate with themselves the surveyor of the county, and were to go round, procession and re-mark the land of the applicant, and renew and put up lost boundaries, and make out a diagram of the land; they are also authorized to take testimony to establish boundaries, and to perpetuate it.

Their survey, as well as the depositions which they were to take, were to be reported to the clerk of the court, and to be by him recorded without consulting the court in the matter.

But this same act still keeps up the double machinery of general processioners, as well as special ones, and saves that part of the act of 1796, by the following provision.

"Nothing in this act shall be so construed as to repeal so much of the law as directs the county courts

to lay off their counties into districts, and appoint standing commissioners for the processioning lands; and the said courts are hereby authorized to make re-appointments in cases of death, removal, or refusal to act, of any of the processioners, at any time when they may deem it expedient; *but said processioners shall be governed by the regulations contained in this act, any thing to the contrary notwithstanding.*"

Whether these general or standing processioners, (who are the kind of processioners that have made the report in question,) can take depositions to perpetuate testimony, as these have done, and whether the court, and not the clerk, has any thing to do with the report, either of the processioning, or of the testimony, depends upon the effect and construction of the last clause of the section just recited, when construed with the provision of the act of 1796, and forms the main questions in the case under consideration.

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Their report of processioning and of the testimony directed to be made to the clerk, and not to the court.

Standing processioners, appointed by the act of '96, directed to be kept up, and to be governed by this act of 1815.

We have already seen that the special commissioners have power to perpetuate testimony, and the general commissioners had not that power, as the law stood before the act of 1815. Does the clause in the latter act, which directs the general commissioners to be governed by its regulations applicable to the special ones, confer the power to the general ones to take testimony? We conceive that it does, and that while the general processioners are to conform to the rules governing the special commissioners in things which they could previously have done, they may also do those acts which they could not have previously done, because the special commissioners were authorized to do such acts. This construction will occasion less difficulty in the statutes as they now stand, and free them from some nice distinctions between the power and duties of the respective kinds of commissioners or processioners, which would be often disregarded in practice, and embarrass the operations of the act. It will place the powers and duties of the two classes of commissioners precisely on the same footing, and leave parties at liberty to apply to either, and to proceed in

By this act of 1815, the standing processioners may take testimony, and they and the special commissioners are given all the same powers.

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Reports of the standing commissioners must be made to court, and then judicially passed upon. Otherwise as to the reports of the special commissioners appointed under either act: they report to the clerk.

When the standing processioners perform the duties required by both the acts, they make but one report, and that to the court, when it must be passed upon and ordered to record.

the same way until they report their work to the clerk.

The question then arises, can the clerk record the report, or must the court first approve thereof? The clause above noted which brings the duties of the two classes of commissioners to the same measure, has not altered the duty of either court or clerk. The two sets of commissioners are to act alike; but when the report is returned their duties cease, and that of the court or clerk commences. Under the act of 1796, the clerk acted on the report of the special commissioners, without the court. He still continues to act on the special commissioners' report by the act of 1815, but he is not directed or allowed in either act, to record the report of the general commissioners except by the act of 1796, according to which, he must await the approbation of the court, and this is the only provision in either act, touching the recording of their report, and it must remain as the only provision regulating the manner, in which their report must come on the record, and it is not altered by the act of 1815.

The only difference existing by the act of 1815, in their report is this; their report, before that act, could only have contained their acts of processioning, and since that act it may contain depositions, as the one in question does. We conceive, however, that these depositions are to accompany and make part of their report, and that the report ought not to be divided into two reports, the one containing the acts, processioning to be returned to the clerk, to be acted upon by the court, and the other to contain the depositions alone, to be returned to, and acted upon by the clerk without the consent of the court. This division of the report into two would be embarrassing and troublesome, and is not necessarily required by the act. Both acts contemplated but one report. That report, by both, is to be made to the clerk. The court is to act upon it before it is recorded by the first act, and that action of the court is not dispensed with by the latter act, and must embrace the additional matter of testimony, which by the latter act, they were directed to add

to their report. That must undergo the same ordeal, with the first kind of report which they were to make. We therefore conceive that the general commissioners or processioners who acted on this occasion, properly took testimony, and that they as properly added it to their report of processioning acts, and made of the whole one report, and that it was proper that the court should act upon and approve that whole report before any part was recorded.

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But there is an exception to the notice given by advertisement. It was inserted in three successive weekly papers, but the day of acting appointed, was before the expiration of three weeks after the first notice, and it is insisted that the three weeks notice required by the act is not satisfied by three weekly insertions, but requires three full weeks to elapse before the time of action commences.

Objection to the evidence of the publication of the notice.

Whether such a construction of the act is right we need not enquire. For the object of the publication is notice to those concerned. Here it is shown that Miller, the plaintiff in error, is the only person affected by the proceedings, and he not only attended the commissioners and interrogated the witnesses, but seems to have taken at least one deposition on his part. Such acts must be construed as a waiver of all exceptions to the sufficiency of the notice.

One who attends the com'rs, and cross examines the witnesses, and takes depositions on his part, cannot object for the lack of notice.

It is also urged that the notice was, that the party with the processioners, should meet at the house of John Patrick, and yet the depositions are taken on the ground, and not at his house.

Notice to meet at a certain dwelling house near the land, and thence to proceed around the land and take the testimony &c. will authorize the depositions to be taken at the corners as the business progresses.

To this exception, the attendance of the party concerned may be given as one answer. And there is still another. It is evident from the notice that the house of Patrick was fixed only as the point of meeting and starting to the business intended. The business according to the nature of it, was to be progressive, not only in time, but also from place to place, and whenever in this progress it became necessary or expedient to do certain acts, or to take testimony, there was the proper place of taking it, although the notice did not mention the precise spot, at which

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the depositions, would be taken, provided they were not so taken as to avoid cross examination. The remaining points are not worth notice.

There is no error in the decision and it must be affirmed with costs.

Caperton for plaintiff; *Turner* for defendants.

CHANCERY.

Ballard vs. Stephenson.

Case 76.

Error to the Hardin circuit; PAUL I. BOOKER, Judge.

Rescission of Contracts. Improvements. Rents. Assignments. Equity.

June 14.

Judge OWSLEY delivered the opinion of the court.

Sale to Gilleland by Stephenson.

STEPHENSON sold two hundred acres of land to Gilleland, received forty or fifty dollars of the sale money, took Gilleland's note for the residue of the price, and executed his bond to Gilleland for a conveyance of the title.

Bond for the land assigned Ballard, and judgment at law recovered.

The bond for a conveyance was afterwards assigned by Gilleland to Ballard, who brought suit at law upon it against Stephenson, and recovered judgment against him for four hundred and forty dollars, that being the amount of the price which was contracted to be paid by Gilleland for the land, and interest thereon.

Bill for injunction by Stephenson.

To be relieved against that judgment, Stephenson exhibited his bill in equity, with injunction, making both Gilleland and Ballard defendants thereto.

Allegations and prayer of the bill.

After setting out the contract for the land, and charging that but fifty dollars of the price had been paid by Gilleland, he alleges, that before the bond for a conveyance, upon which the judgment at law was recovered, was assigned to Ballard, the contract about the sale of the land had been cancelled between him and Gilleland, and that the land has been occupied by Gilleland, and Ballard claiming under him, for several years; a reasonable compensation for the occupation and use of which he claims against them, and prays not only that the judgment at law be perpetually enjoined, but also that a decree

for the rent of the land be granted him, together with such further relief as the nature and equity of his case may demand, &c.

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Gilleland protests against any decree being made against him; but his answer contains nothing of any advantage to either of the other parties, and need not be further noticed.

Gilleland's
answer.

Ballard professes to know nothing of the contract having been cancelled, as charged in the bill; states that he purchased and obtained from Gilleland, for a full consideration, the assignment of Stephenson's bond for a conveyance; alleges that the land, whilst in a state of nature, was taken possession of by Gilleland, under his purchase from Stephenson, and that valuable and lasting improvements have been since put upon the land, by him and Gilleland. He moreover insists, that if he be liable for rents, his liability should be measured by its value, clear of the improvements, which have been put upon the land by him and Gilleland, and he prays for a decree against Stephenson for the value of the improvements, &c.

Ballard's answer and cross bill against Stephenson.

The circuit court sustained Stephenson's bill, decreed a perpetual injunction against the judgment recovered by Ballard at law, and dismissed Ballard's cross bill, without prejudice to any other suit, and decreed cost in favor of Stephenson.

Decree of the circuit court.

With respect to the alleged cancelment of the contract of sale, the case is free from all difficulty or doubt. The evidence contained in the record, satisfactorily proves, that before the bond was assigned by Gilleland to Ballard, the contract between him and Stephenson, in relation to the sale of the land by the latter to the former, had, by their mutual consent, been abandoned, and was to be cancelled and held for nought, so that if the case turned exclusively upon the cancelment of that contract, we should have no hesitation in sustaining the decree perpetuating the injunction against the judgment at law.

Cancelment of the contract.

But the evidence in the cause goes also to prove, that lasting and valuable improvements were put

It seems that the assign-

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ment of a bond for the conveyance of land, made after the cancelment of the contract between obligor and obligee, confers on the assignee the right to recover for the improvements obligee had made on the premises.

Payment for the improvements by the obligee to the obligor, made after his notice of the assignment, in such case, will be no defence to the claim of the assignee.

If, in such case, the assignee obtain a judgment for an alleged breach in the covenant to convey for the nominal amount of the consideration money and interest,

upon the land by Gilleland before the contract was agreed between him and Stephenson to be cancelled, and that, by the agreement to cancel the contract, it is also proved that Stephenson was to pay for the improvements according to their value; so that it becomes necessary to enquire whether, as the assignee of Stephenson's bond to convey the land, Ballard is not entitled beneficially to the compensation for the improvements, and whether or not, as he has recovered judgment at law upon Stephenson's bond, he ought to be deprived of that legal advantage in a court of equity, without compelling Stephenson to do equity in paying for the improvements.

That Ballard is entitled to whatever compensation Gilleland had any just right to claim for the improvements, admits of no serious doubt. His right is not only inferable from the assignment which he holds of Stephenson's bond from Gilleland, but the proof is clear, that, by the contract between Gilleland and Ballard, the latter was to have the benefit of all claim for improvements which the former had against Stephenson.

There is, it is true, some evidence conducing to show, that Stephenson and Gilleland have adjusted and settled the claim for improvements; but from the whole complexion of the evidence, it is quite evident, that if such a settlement has been made, it must have taken place after Stephenson knew that Ballard was beneficially entitled to compensation for the improvements, and of course the interest of Ballard cannot have been affected by such a settlement.

Entitled, therefore, to pay for the improvements, it is equally clear, that until justice is done to Ballard in that respect, Stephenson should not have the assistance of a court of equity in his favor, against the judgment recovered at law by Ballard. It is a maxim with courts of equity, as old as courts of chancery, and founded on the immutable principles of natural justice, that he that will have equity done to him, must do equity to the same person: Francis' Maxims, Eq. 2. The propriety of the application of this maxim to the present case, is pecu-

liarly striking. Stephenson claims to be relieved against a judgment, which has not only been recovered by Ballard at law, but it was recovered by him upon a bond given by Stephenson for the conveyance of the very land upon which the improvements were made; and not only so, but the improvements were made under the contract, in pursuance of which the bond was executed, and that bond was afterwards assigned to Ballard with the understanding that he was to be entitled to the improvements.

Instead, therefore, of decreeing a perpetual injunction against the judgment at law, the court should, through the intervention of a commissioner appointed for that purpose, have ascertained the value of the improvements which were put upon the land, after it was sold by Stephenson to Ballard, and before the cancelment of that contract by them. The commissioner should also have been directed to ascertain the annual rent of the land, from the time the contract was canceled, in its then state of improvement, up to the time of taking the account, if at that time the land should be in the possession of Ballard; but if he should be not then possessed, the charge for rent should cease running at the time he quit the possession. He should also have been directed to ascertain the value of such improvements as have been put upon the land by Ballard. The improvements made by Ballard, should have been then directed to be deducted from the amount of rents, and if any balance of rents remained, that balance deducted from the value of the improvements made upon the land before the contract of cancelment; and if any balance of the value of the improvements remained, the injunction for so much should have been dissolved, and for the residue of the judgment, if any remained, the injunction should have been perpetuated.

The decree must be reversed, with cost; the cause remanded to the court below, and such proceedings there had as may not be inconsistent with the principles of this opinion, and the usages of equity.

Hardin for plaintiff; *Darby* for defendant.

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and the obligor come with his bill alleging and shewing the prior cancelment of the contract, he must pay the balance of the improvements, after deducting the rents.

Complainant must do equity before he can ask it.

CHANCERY.

Bently vs. Gregory &c.

Case 77.

Error to the Washington circuit; WM. L. KELLY, Judge.

Parties in chancery. Revivor. Process. Error. Practice in this Court.

June 14.

Judge OWSLEY delivered the Opinion of the Court.

Judgment at law by Pile.

As assignee of Leroy Gregory, to whom Bently and his surety, Conover, executed a note for \$72 50 cents, Benjamin Pile brought suit upon the note, and recovered judgment at law. The note is dated the 11th of Oct. 1822, and was assigned by Gregory to Pile, the 25th January, 1823.

Bill for injunction against the judgment rendered against principal and surety, brought by principal only.

To be relieved against the judgment, Bently exhibited his bill in equity, with injunction, making Pile and Gregory defendants thereto, and suggesting that Conover was no otherwise interested than as his surety in the note upon which judgment was recovered at law, and omitting to make him a party.

Allegations of the bill for set-off.

The bill alleges Gregory to be insolvent; charges him to have been owing Bently by note, prior to his assignment to Pile, and is still owing a much larger amount than that mentioned in the assigned note to Pile, and prays for the debt so owing by Gregory, to be applied by way of set off to the satisfaction of the judgment recovered by Pile, and for general relief.

Pile and Gregory each answered the bill, but the contents of their answers need not be particularly noticed.

Death of Pile, the plaintiff in the judgment, and no revivor.

Pile afterwards died, and an order was made by the court reviving the suit against his administrator, but there does not appear to have been any service of the order of revival on the administrator of Pile, nor does he appear to have done any thing in the preparation or management of the cause.

Decree dismissing the bill.

The cause was however heard, and a decree made dismissing the bill, and dissolving the injunction, with damages and cost.

Decree disproved on the merits.

The decree is doubtless erroneous. The merits of the case are decisively in favor of the complain-

ant, and we should have no hesitation, not only to reverse the decree, but also to remand the cause to the court below, for a decree to be there entered perpetuating the injunction against the judgment at law, if there existed no irregularity in the preparation of the cause for hearing.

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Entertaining, however, as we do, the opinion that the cause was not in a proper state of preparation for a final hearing upon the merits, it would be premature now to give peremptory directions as to the ultimate disposition of the case upon the merits.

Practice in
this court.

The irregularity which we understand to exist in the preparation, does not consist in the failure of the complainant to make Conover a party to the suit. Conover is but the surety of Bentley in the note upon which the judgment at law was recovered, and it has been repeatedly held, and, we apprehend, correctly, that without making the surety a party, the principal may, by bill in equity, assert any equity which he may have against the demand for which he and his surety are bound at law.

It is not necessary, in a bill by the principal defendant in a judgment at law for injunction, that the surety be made a party.

The irregularity consists in the complainant not causing a copy of the order to be served upon the administrator of Pile, after the order of revival was made by the court, and before the cause was heard upon the merits. As Pile had answered the bill before his death, no bill of revivor was necessary to revive the suit against his administrator; but according to the express directions of the act of the legislature upon that subject, a copy of the order should have been served upon the administrator before the cause was heard upon the merits, without appearance by him.

Where a defendant dies after answer, the bill may be revived against his representatives by an order of court, but the representatives must be served with a copy of the order.

The decree must be reversed, with cost, and the cause remanded to the circuit court; but as the administrator of Pile is now before this court, it will be unnecessary for a copy of the order reviving the suit to be served upon him after the cause returns to that court. The administrator should, however, on the return of the cause to the court below, be allowed, under the discretion of that court, reasona-

A party who appears in this court, shall be considered before the circuit court, upon the return of the cause.

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ble time to prepare and make his defence to the merits of the contest.

Turner and Monroe for plaintiffs; *Triplett* for defendants.

CASE.

Maddox vs. McGinnis.

Case 78.

Error to the Bourbon Circuit; GEO. SHANNON, Judge.

*Declaration. Malicious prosecution without probable cause.
Arrest of judgment.*

June 14.

Judge MILLS delivered the Opinion of the Court.

Verdict for
plaintiff, and
judgment ar-
rested.

THE plaintiff in error brought his action, for malicious prosecution, against the defendant; and on the trial of the general issue, recovered a verdict. The defendant moved to arrest the judgment, relying on the ground, that the declaration did not contain an averment that the prosecution was commenced and carried on without any probable cause. On the other hand it was insisted, that as the declaration alleged the prosecution to be *falsely and maliciously* carried on, the want of the averment that it was without probable cause, is cured after verdict, and will be supplied from the "falsely and maliciously." The court arrested the judgment, and the plaintiff declining to amend his declaration, judgment was rendered for the defendant, and to reverse it, this writ of error was prosecuted.

Ancient authorities that the averment in the declaration for malicious prosecution, that there was no probable cause, was not fatal.

In searching the English elementary treatises, no position is more plainly laid down, and insisted upon, than, that a prosecution must be carried on without any probable cause, or an action will not lie. It may be gathered from nearly all these writers, that it is immaterial what aggravating circumstances attend a prosecution, if there be probable cause. In that case no action would lie. So that the want of probable cause, seems, in the opinion of these writers, to form the gist of the action. But, notwithstanding this doctrine so often appears when the adjudged cases are pursued, it will be found, that in nearly all the ancient adjudged cases, even down to the time

of our revolution, it was held again and again, that the insertion of the express averment, that there was no probable cause, was cured after verdict, and even upon demurrer, if there were averment that the prosecution was falsely and maliciously begun and carried on. Such is the case of *Jones vs. Quyn*, 10 Mod. 214, which has been cited and relied on in the argument of this case.

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But the more modern cases, as well as the American courts, have adopted a different rule, and have as often held that the lack of the averment, "without any probable cause," cannot be supplied by the words falsely and maliciously. The variation in the English cases is well explored and exhibited, by judge Tucker in the case of *Kirtly vs. Dick* and others, 2. Mun. 10, in which case the court of appeals of Virginia followed the modern cases, and held that the averment, without any probable cause, was indispensable, and the want of it could not be supplied by the words "falsely" and "maliciously." That same court, in two previous cases, to-wit: *Ellis vs. Thilman* 3 Call, 3; and *Young vs. Gregory*, *ibid.* 446, had come to the same conclusion. In this court, the question arising between these conflicting authorities has never been settled, as far as we know. The doctrine, that want of probable cause, is the gist of the action, has incorporated itself with all our decisions; but whether it can be supplied by the words "falsely and maliciously" has never here been expressly decided.

In a declaration for malicious prosecution, the averment that the prosecution was without any probable cause, is indispensable, and the defect not cured by verdict.

In coming to a conclusion between such conflicting cases, we have no hesitation in following those of modern date, as adopted by the appellate court of Virginia as more agreeable to principle. We would not be understood as saying, that the identical words, "without any reasonable or probable cause," are indispensable.

We admit, that other expressions may be used, which include the same meaning; and if the averment is included in the sense and meaning of the declaration, it is enough. But the words "falsely and maliciously" are not enough. For we hold the law to be that a prosecution may be false, and that

Words of the same sense of "without any probable cause," will be sufficient.

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But, falsely
and mali-
ciously, will
not supply
their place.

there may not be a word of truth in charging the accused with it; that it may also be begun and carried on in malice on part of the prosecutor, and yet if there is probable cause, no action will lie. The want of truth in the accusation, and the existence of full malice in the prosecutor, is not enough. Probable cause must be absent. Indeed this doctrine is necessary for the security of society; and if actions for malicious prosecutions could be sustained because the accusation on all the evidence turned out to be untrue, or because there was malice in the prosecutor, prosecutions would be too few for the crimes of society. It frequently happens, that those who feel some malignity or spleen against the accused, are the only persons who will commence the prosecution; and if none existed, the prosecution would frequently never exist. In this respect even malice becomes one of the safeguards of society, and is the occasion of bringing offenders to justice, who otherwise would escape; and we cannot doubt but that malice may exist in the prosecutor, and yet there be probable cause to believe guilt in the accused, and he be innocent. If all these can exist, at the same time, to wit: malice in the accuser, innocence in the accused, and probable cause to believe that he is guilty, then it is evident that the averment is indispensable, and is not supplied by any other averment in this declaration.

Judgment affirmed, with costs.

T. A. Marshall for plaintiff; *Depew* for defendant.

CHANCERY.

Kennedy vs. Davis' devisees &c.

Case 79.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

Specific performance. Assignor and assignee. Parties. Conveyances. Warranties.

June 14.

Judge MILLS delivered the Opinion of the Court.

Case of Davis' devisees against the Kennedys

THE devisees of Joseph Davis, to-wit: Robert, John, and William Davis, filed their bill against Thomas and Joseph Kennedy, claiming, thro' their testator, the conveyance of a tract of land

claimed by the testator, under a contract with the ancestor of the Kennedys, and also by a written contract with Thomas Kennedy himself. A decree was rendered, directing Thomas Kennedy, as well as Joseph, to convey the land, amounting to a little upwards of nine hundred acres. On an appeal to this court, the decree was affirmed as to Thomas Kennedy, who held the legal estate; but was reversed as to Joseph who disclaimed; and that decree of the appellate court was conformed to by the court below.

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_____ formerly decided here.

But in this situation, before any of the costs were paid of this decree, in either court, and before any conveyance by Kennedy, William Davis, one of the complainants in that suit, departed this life, and devised his interest in the land so recovered by the first decree, to his wife and three children, and constituted executors, and his wife executrix.

Will, and death of W. Davis, of the successful party, before decree executed.

The said devisees of William Davis, together with the remaining executors, filed this their bill to revive the former decree, to recover the costs thereof, to compel a conveyance in accordance with the first decree, to make partition between the devisees of Joseph Davis, and have the benefit of their interest in severalty; and also to charge Kennedy with rents, as he had held part of the land in possession by virtue of a judgment in ejectment which he had obtained, and also claiming it under a pretended purchase from Robert Davis, one of the devisees and complainants in the first suit.

Bill by the devisees of Davis &c. to revive and execute the decree.

Kennedy, in his answer, does not resist the decree which the bill seeks to revive and enforce, but alleges that Robert Davis, one of the complainants in that record, had sold 82 acres of his interest to John Morehead, and had given his bond to convey it, and had also sold 325 acres to Pitman, and given his bond to convey; and that he, the said Robert, had received the consideration stipulated to be given, and that each of their bonds were acquired by him (Kennedy) by assignment, and under their bonds he claims his interest in the land; and he makes his answer a bill against his co-defendant, Robert Davis,

Kennedy's answer and cross bill.

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visees, &c.

Answer of
Davis.

and prays that he may be compelled to relinquish his claim, and to quiet his possession.

Robert Davis answers, and admits the decree, and claims a greater interest than the decree allows him. It seems by the will of Joseph Davis, and the record of the decree, that the tract of land recovered from Kennedy, was, in its general form, much longer than wide; that by his will, he devised 300 acres from one end, to John Davis; 300 acres from the other end, to Robert Davis; and then, what was left in the middle, to William Davis, subject to be taken by Robert and John, if they would pay William £50 per hundred acres on his arrival at age. Robert, to account for his having sold more land than was devised to him, insists, first, that he held a bond on Joseph Davis, the testator, for 500 acres, which is mislaid, but of which he offers proof; and next he insists that he had agreed with William Davis, to take his share at the rate of £50 per hundred, as fixed by the will; and had paid part of the price. He admits the sale to Morehead, and his receipt of payment, and also his sale to Pitman, and a reception of part of the price, and exhibits Pitman's notes for the residue, and professes himself willing to convey on payment of the balance; and if it is not paid he insists, that the land may be sold to make up the deficit; and he likewise makes his answer a cross bill against Kennedy.

John Davis was served with process, and never answered.

Decree of the
circuit court. The court below assigned 300 acres to Robert, 300 acres to John, and the balance, being the middle territory, to the devisees of William, and decreed conveyances accordingly; but as between Kennedy and Robert Davis, there was no decree giving one money and the other land, or rescinding the contract; and yet the whole proceedings are closed.

Error assign-
ed. Kennedy has prosecuted this writ of error, and assigned errors in the decree between himself and the devisees of William Davis, as well as between himself and Robert Davis.

We cannot perceive any error in the decree in fa-

vor of the executors and devisees of William Davis. Their right under the will of their immediate testator, as well as the will of the remote testator, and the decree to be revived, is clear. Neither Robert Davis, or Kennedy claiming under him, has been able to shew any purchase from William Davis, or a tender to him of £50 per hundred acres, on his arrival at full age; nor have they been able to shew any title from Joseph Davis, other than what his will has granted. Robert and John are therefore entitled to only 300 acres each, from each end of the tract and the devisees of William Davis to all left between them, which turns out to be 315 acres.

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Decree in favor of the executors and devisee of W. Davis, approved.

It is objected, that William Davis' representatives have been allowed to recover the costs of the former suit, both in the court below and in the appellate court. We are unable to perceive any valid objection to the decree on this account. The costs were part of the ancient decree which was to be revived, and the representatives of William Davis were entitled to at least their proportionate share. But here they have shewn themselves entitled to the whole. They have charged, that the suit was prosecuted by William Davis, and at his expense; and that he sustained the burden of it. This allegation has not been contested by either Robert or John Davis; and as they are parties to this suit, and do not contest this matter; a decree of the whole to William Davis' representatives cannot prejudice Kennedy, as he by the force of the decree will be discharged from any payment to them.

Representatives of the complainant in the original bill, who paid the cost allowed in the bill to revive and execute the decree, to recover all the costs in exclusion of the other complainants.

But as between Kennedy and Robert Davis, the decree cannot be sustained. It might be difficult to ascertain precisely how far the mutual rights of these parties would be barred by the decree. Certain it is, they would not be unaffected, and for this cause, the decree as to Robert Davis must be reversed.

He admits that he sold to Morehead 82 acres, and received the payment; and he also sold to Pitman 325 acres, making 107 acres more than he was entitled to. After deducting the 82 acres sold to Morehead, from the 300 acres to which he is really entitled, there remains 218 acres only, to fill his con-

In a bill by an assignee of a bond for land, the assignor is not a necessary party; but if a balance of the purchase money remains, that must be paid, or the land may be subjected.

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tract with Pitman. The price at which he sold the whole to Pitman, appears to be £608, for the 325 acres; when, at the same rate for the 218 acres, the price would have been £407 16s. 6d. only. He has received £360, which leaves due to him only £47 16s. 6d. to which he is entitled, with its interest, from the 1st of February, 1806, when this last bond from Pitman became due. The rest of the bonds, or notes, which he holds on Pitman, he is not entitled to, because of the deficiency in the quantity of land. Pitman, however, is not a party to this suit, nor need he necessarily be made a party. The bond which he holds on Robert Davis, for the conveyance of the land, and which he has assigned to Kennedy, is, according to former decisions of this court, assignable so as to vest the legal estate in Kennedy, and it has also been held that an assignor who passes his legal estate in an instrument by assignment, is not a necessary party to a bill brought for specific performance. But as Kennedy holds his contract, and requires its fulfilment, he must do the equity that Pitman would be bound to do, were he before the court. He must pay the balance due, or submit to a sale of the land for the purpose of the payment of the money.

Mode of pro-
 ceeding, to
 subject the
 land in such
 case.

A decree, therefore, ought to be entered, giving day for the payment of the £47 16s. 6d. with interest thereon after the rate of six per centum per annum, from the 1st of February, 1806, till paid, which day ought to expire in term time, and then, if it is not shewn to the court that the money has been paid, the court by its decree, is to direct the sale of the 218 acres, or so much thereof as shall be necessary to discharge that sum, and the title is to be made to the purchaser. But if Kennedy shall prevent the sale by the payment of the money, then the title is to be made to him.

Query, of the
 effect of the
 warranty in
 a conveyance
 on a certain
 condition,

But the tract of three hundred acres which it now becomes the duty of Robert Davis to convey to Kennedy, is part of the same tract, which Kennedy was directed to convey to R. Davis or at least to him and his co-complainants, by the former decree, with warranty. If these warranties shall both be made,

and Kennedy should be hereafter evicted, it may, under the state of the law of warranty in this country, present a question new, and somewhat difficult, as to what effect these warranties should have on each other. For instance, the consideration for which Kennedy is to warrant, may not be greater than half the consideration for which Davis gives his warranty to Kennedy. Now, could Kennedy, in case of eviction, recover this whole consideration of R. Davis, without abatement by the consideration which he had received, and for which he had warranted to Davis? We do not think it necessary to enquire into and settle this question before it shall occur by eviction; but we do not think it proper to prejudice or effect it, by directing Davis now to convey, without respect to what Kennedy is bound to do.

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and of a warranty in a reconveyance by the grantor back to the grantee, and greater consideration in case of eviction.

To avoid this, we conceive it best now to direct that to be done, which ought to have been done at the time, to-wit: first, a conveyance with warranty by Kennedy to R. Davis, according to the decree, and fixing the consideration as accurately as that record will enable it to be done; and then, to compel R. Davis to convey to Kennedy inserting in the deed the true consideration that Kennedy or his assignors have received. • This proceeding cannot be wrong, and if the question alluded to is a real existence, then it will not be affected. If it is no question of moment, then the mode adopted cannot make it one. It seems that R. Davis will be bound to convey to Kennedy (after first receiving a conveyance from him for the three hundred acres,) the 82 acres contained in the bond of Morehead. This is a separate contract with Morehead, fulfilled on the part of Morehead. He must also be directed to convey, as before directed, the remaining 218 acres, provided Kennedy, in a reasonable time given, removes the lien therefrom, by paying up the purchase money still due thereon. But if this money is not paid, then a sale of the land, to-wit: the 218 acres, is to be decreed for the purpose of discharging the balance of the purchase money still due to R. Davis, in which event the title of the first sold is to be made to the purchaser.

Executory contracts of sale and resale in such a case, ordered to be both executed by warranty deeds, expressing the considerations in each case, that the warranties may have their legal effects.

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Decree.

The decree, therefore, as to the devisees of William Davis and John Davis, must be affirmed with costs; but as to Robert Davis, the decree must be reversed, with costs, and the cause remanded for such further orders and decrees to be entered therein, as shall not be inconsistent with this opinion, and the equity of the case.

Caperton and J. S. Smith for plaintiffs; Turner for defendants.

EJECTMENT.

Boner &c. vs. Smith &c.

CASE 79.

Error to the Pendleton Circuit; WILLIAM O. BROWN, Judge.

Costs against plaintiff, or his lessors. Circuit rule. Judgment by confession and consent. Error.

June 16.

Chief Justice BIER delivered the opinion of the court.

Part of the lessors of the plaintiff struck off the declaration, and made defendants with the tenants in possession.

THE present plaintiffs in error were lessors of the nominal plaintiff, John Doe, in a declaration of ejectment against the casual ejector, Richard Roe. The notice was served on Larkin Smith, the tenant in possession, on the first day of April, 1826. At the return term, on motion of Elisha Erwin and Sarah his wife, their names, which had been inserted in the declaration as lessors of the plaintiff, were stricken out.

Confession of lease, entry, and ouster, on condition an actual ouster should be proved.

At a subsequent day of the term, the present plaintiffs in error, (the remaining lessors) came, and came also the tenant, Larkin Smith, and Elisha Erwin and Sarah his wife, and were admitted to defend in the place of the casual ejector, upon an offer to enter into the rule, to confess lease, entry and ouster, provided an actual ouster should be proved on the trial, and accordingly, the rule was specially entered, that the defendants agreed to confess lease and entry, and also ouster, provided an actual ouster should be proved, and the plaintiffs joined in the rule; by which it was stipulated as usual, that in case the plaintiff failed to prosecute his suit, for any other cause than the defendants not confessing lease, entry and ouster, as aforesaid, or if a verdict passed for the defendant on trial, that then, the lessors of

the plaintiff would pay to the defendants their costs, to be taxed, &c.

Afterwards, the plaintiff, upon his motion, discontinued, and thereupon the judgment was rendered for the defendants, that they recover their costs of the lessors of the plaintiff.

Afterwards, on the same day of the term, on motion of the lessors of the plaintiff by their attorney, the discontinuance was set aside, and also the judgment for costs; an order of survey was made, and the cause was continued until the next term.

At the ensuing term by consent of parties, it was ordered that the last order of the preceding term "setting aside the discontinuance &c. be set aside, and that said suit stand discontinued."

And now the said lessors of the plaintiff, in their proper names, have sued their writ of error to the judgment of April term, for costs, and camplain, and assign for error, that the court rendered the judgment for costs against the lessors of the plaintiff, instead of against the casual ejector.

It is true, that upon the appearance of the tenant and landlord, the lessors of the plaintiff might have refused to join in the consent rule, and might have abandoned the action, without being liable for costs.

But they joined in the consent rule, and thereby became responsible for costs, according to the terms of that rule.

Ordinarily, in case of a nonsuit, or verdict for defendant, the judgment for costs is entered against the plaintiff, who is the nominal person (the defendants not having violated the consent rule;) thereupon the costs are taxed, and marked upon the consent rule; and if upon presentation thereof to the lessor of the plaintiff, and demand made of the costs, by the defendant personally, or by his attorney named in the rule, the lessor refuse to pay, upon affidavit of such demand and of the lessor's refusal to pay the costs, an attachment may be obtained against the lessor.

BONER &c.

vs.

SMITH &c.

Action discontinued, and judgment for costs against the plaintiff's lessors.

Discontinuance set aside, and order of survey.

Order setting aside the order of discontinuance, itself set aside by consent, at the next term.

Error assigned in the judgment for costs against the lessors.

If the lessors of the pl'ff refuse to join in the consent rule, and abandon their suit, they escape costs.

Where the lessors enter into the consent rule to pay costs, they are liable, and may be compelled to pay them by attachment. But—

Query, of the propriety of rendering a judgment against the lessors.

BOONE &c.
vs.
SMITH &c.

The complaint then is, to the form of the judgment for costs, that it is against the persons really existing and properly responsible for them, instead of against the fictitious plaintiff, who, because he is not existing, is in fact irresponsible.

Whether this court ought to reverse a judgment for costs, merely because it is entered against the lessors of the plaintiff, that is against the real plaintiff, instead of against the fictitious nominal plaintiff, may admit of future consideration.

Where the order setting aside a judgment for costs, is itself set aside, by consent at a subsequent term, the first judgment is restored, and stands as a judgment confessed, and cannot be reversed here.

In this case, the judgment was entered against the lessors of the plaintiff; after that judgment for costs had been actually set aside, they did, at a subsequent term, consent to set aside the order of the preceding term, which had rescinded the judgment for costs. It is by virtue of this consent, given and entered at the subsequent term, that the judgment for costs against the lessors stands. Without the consent of the July term, the judgment for costs at the preceding term would not be in force and operation; it was annulled; the plaintiffs assented to an order for restoring it; and now prosecute their writ of error to it. It is now a judgment by consent; which, like every judgment by confession, is equal to a release of errors. The common law maxim is, "*consensus tollit errorem.*" The statute says, "a judgment by confession shall be equal to a release of errors." 1. Digest 255, Sect. 44. It would be going far in the teeth of the common law and statutory law, were we now to reverse a judgment which owes all its force and operation as a judgment to the consent of the parties to that judgment, and to the consent of the very persons complaining of it.

Judgment affirmed.

It seems to this court that the consent given at the July term, 1826, by which the rescinded judgment of the preceding term, was again made operative and in force, is equivalent to a release of errors apparent on the record. It is therefore considered by the court, that the said judgment be affirmed, with costs, &c.

Depew for plaintiffs.

*Hart vs. Hampton.*Error to the Clarke Circuit; *Geo. SHANNON*, Judge.

CASE.

Case 80.

*Sheriff's sales. Deceit. Sales.*Chief Justice *Bias* delivered the Opinion of the Court.

June 17.

THE declaration alleges, that the sheriff having an execution against the defendants, George and Jesse Hampton, was directed by the defendants to levy on sundry slaves, which the sheriff did accordingly; that at the sheriff's sale, the plaintiff, Hart, bid for and purchased one of the slaves for a sound price; that the plaintiff bid under the belief that the slave was sound, and became the best bidder, and gave his bond to the sheriff for the price of \$225, as required by law, that the slave was unsound and diseased of the asthma, which rendered him of no value; that the defendants were present at the sheriff's sale, knew of the unsoundness, and did not disclose it, but concealed it.

Defendant in an execution is not responsible for not disclosing at the sale, diseases of his slaves, or other defect in the property exposed to sale; he is not vendor.

The defendants demurred. The court sustained the demurrer.

We perceive no principle of law by which the defendants can be charged in an action of deceit, for being silent at a sheriff's sale of their property. They are not the vendors, but the sheriff; he proceeds by the precept of the law; he was acting upon the defendants, as the law supposes, against their will, and in obedience to his duty imposed by law. The law authorizes him to seize and sell the property of the defendant in the execution, such as it is. The declaration alleges nothing against the defendants at the sale, but that they were silently and passively obedient to the process of the law.

Judgment affirmed, with costs.

Hanson for plaintiff; *Simpson* for defendant.

MONROE'S REPORTS.

CHANCERY.

Sallee vs. Duncan.

Case 81. Error to the Christian Circuit; BENJ. SHACKELFORD, Judge.

Answers of usurers.

June 17. Judge OWSLEY delivered the Opinion of the Court.

Judgment at law. SALLEE executed a note to Duncan for three hundred and fifty dollars, payable one day after date. Suit was brought upon the note by Duncan, and judgment at law recovered for the amount thereof, with interest and cost.

Bill for injunction. To be relieved against the payment of eighty dollars and seventy nine cents of the principal of the note, Sallee filed his bill in equity, and obtained an injunction against that much of the judgment.

Allegations of the bill complaining of usury. He alleges, that on a settlement, he fell indebted to Duncan, for principal and interest then due, two hundred and sixty nine dollars and thirty cents, and not possessing the means of payment, and to obtain time, it was usuriously agreed between him and Duncan, that he would give a gross sum of thirty per centum on the amount due, and Duncan should indulge him until he could make the money; and that in pursuance of that agreement the note, including the amount due and thirty per centum thereon, was executed by him to Duncan, making in all three hundred and fifty dollars.

Answer of the usurer. Duncan answered the bill, by passing over in silence the allegation with respect to the settlement, and the amount which was thereby ascertained to be due from Sallee, but stating, that he sold the complainant a tract of land and took his note for part of the purchase money; that he believes the complainant gave his note payable one day after date, which is, of itself, a manifestation that this defendant had not agreed to indulge the complainant longer than it should be found convenient for the defendant's interest. He denies that he made any particular agreement with the complainant to indulge him in the payment of the money specified in said note, other than in said note named, he says, that he might have observed to the complainant, that he felt disposed to indulge him for the payment

of the money as long as it was convenient, but made no contract with the complainant for forbearance beyond the time the note became due. He does not admit, that he agreed with the complainant for the consideration of the gross sum of thirty per centum on said money; that he would indulge said complainant until he could make said money. He also denies that there was the sum of eighty dollars and seventy cents of usurious interest, charged in the note, as the complainant has alleged.

SALLEE
vs.
DUNCAN.

The case was heard in the circuit court, on the bill and answer, without any deposition on either side, and a decree was pronounced dismissing the complainant's bill, and dissolving his injunction, with damages and cost.

Decree of the
circuit court
for the de-
fendant.

Instead of the decree which was made, we think the injunction should have been perpetuated, with cost. The answer displays a strained effort on the part of the defendant, by passing over and evading some of the material charges in the bill, and catching at and responding to other expressions, not so essential, to secure himself from the effects of an unconscientious and illegal contract, while, throughout his whole answer, he shews a conviction that it was oppressively usurious, though not so precisely to a cent as charged in the bill. He denies making any particular agreement of forbearance, though he admits he may have observed that he felt disposed to indulge the complainant for the payment, as long as convenient. He does not admit that he agreed, for the gross sum of thirty per centum on the money, to indulge the complainant until he could make the money, and he denies that there was eighty dollars and seventy cents usurious interest charged in the note; but he does not deny that any usury was charged, nor does he even allege, that on the settlement, more than two hundred and sixty nine dollars and thirty cents was due him from the complainant; and though that be in truth the only sum which was owing by the complainant, and all above that which is contained in the note be for usurious interest, his denial, that the gross sum of thirty per centum was charged in the note, may be literally true; that per

Answer ex-
amined and
pronounced
evasive, the
contract held
to be usuri-
ous, and relief
ordered.

SALLEE
vs.
DUNCAN.

centum, when added to the sum due, not making within nine cents the amount for which the note was executed.

Upon the whole complexion of the answer, we have no hesitation in pronouncing the contract usurious, and that all above two hundred and sixty nine dollars and thirty cents, contained in the note, was charged for the forbearance of that sum.

The decree must therefore be reversed, with cost; the cause remanded to the court below, and if so much of the judgment remains unpaid, a decree must be there entered, perpetuating the injunction for the principal above \$269 30 cents, and interest thereon; but if the judgment is paid, then such decree be there entered as will enable the complainant to recover the amount which ought to have been enjoined.

Mays for plaintiff.

CASE.

Boone vs. Rains.

Case 82.

Error to the Mason Circuit; W. P. ROPER, Judge.

Mortgages. Equity of redemption. Recaption.

June 17.

Judge OWSLEY delivered the Opinion of the Court.

Declaration.

RAINS sued Boone, in case, and declared against him for having maliciously, and without probable cause, prosecuted Rains, for stealing, taking, and carrying away, a horse.

Instructions.

The horse, for the stealing of which Rains was prosecuted, appears to have been put into the possession of Boone by Rains, as a security for the payment of money which Boone loaned to Rains, and which by agreement of the parties, was to be repaid within ten days.

After the evidence was through, the circuit court, on the motion of Rains, instructed the jury in substance, that notwithstanding the money loaned by Boone was not paid by Rains within the ten days in which it was to have been returned, that Rains had afterwards a right to redeem the horse, as property

mortgaged, and that upon tendering the money borrowed, and interest, to Boone, after the ten days were out, he had a right to take the horse, provided that in taking him he committed no violence.

BOONE
vs.
RAINS.

Now, by the instruction thus given, the court most clearly encroached upon the province of the jury, and undertook to decide upon the facts involved in the contest, as well as the law arising upon those facts. If by the agreement between the parties under which the money was advanced by Boone, and the horse delivered into his possession by Rains, the horse was to become the rightful property of Boone provided the money was not repaid within the ten days, it is perfectly clear, that after failing to pay within that time, Rains could have no legal right upon subsequently tendering the money, with interest, to take the horse without the assent of Boone, and whether or not such was the right to which Boone was by the agreement to become entitled, upon the failure of Rains to pay within the stipulated time, depends upon the opinion, which it was the office of the jury, and not the court, to form upon the evidence introduced on the trial.

It seems the mortgagor does not, by the tender of the mortgage money, acquire the right of recaption of the goods in mortgagee's possession, but must appeal to equity.

It was undoubtedly competent for the parties, by their mutual agreement, to contract for the legal right of property in the horse to pass to and become vested in Boone, upon the happening of a future contingency; and as the evidence conduced to prove an agreement by which they contracted for the right to become vested in Boone upon Rains failure to pay the money within ten days, the court must have erred in deciding that, after the expiration of that time, a tender of the money by Rains gave him any legal right to the property, though such a tender might, in a court of equity, authorize a redemption of the property, provided the agreement be construed in the light of a mortgage, and to pass the legal title as such.

The judgment must be reversed with cost, the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

Brown for plaintiff.

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EJECTMENT.

McGuire &c. vs. Kouns.

Case 83.

Appeal from the Greenup Circuit; WM. P. ROPER, Judge.

Sheriff's sales and deeds. Evidence. Executions. Judgments. Records.

June 17.

Judge MILLS delivered the opinion of the court.

Case of ejectment for town lots purchased at sheriff's sale.

THIS is a judgment in ejectment, obtained for certain lots in the town of Greenupsburg; and the title given in evidence by the lessor of the plaintiff, was obtained by him under a purchase from the sheriff, under execution. During the trial, various exceptions were taken to the title of the plaintiff, the most important of which will be noticed in revising the judgment.

In proof of title under a sheriff's sale, the copy of the judgment and so much of the record as shews an appearance of the parties, or service of the process on the defendant, is sufficient, without a complete transcript.

The judgment on which the execution issued, was in the Scott circuit court, and the lessor of the plaintiff did not offer in evidence a complete copy of the record, but only the entry of the writ of enquiry of damages, and judgment thereon, after entering the names of the parties, and their appearance. This was objected to, because all the record was not produced; but the objection was overruled by the court.

It is a general rule, that records, when used in evidence, must be produced entire. But this rule is laid down with some exceptions and limitations. The reason assigned for it is, that the part of the record which is lacking, may give the rest a different meaning. Where a record is used as evidence to prove the facts therein contained, the rule well applies. But where it is only used as it is here, to shew the fact that there was such judgment, then, so much of the record as is relevant, is frequently permitted to be used. Here the fact to be shown was, that there was such judgment to warrant the execution, and enough of the record is produced to establish that fact. It would be highly inconvenient to compel parties who hold titles under sheriffs' sales, to produce from distant counties complete records in suits in chancery or at law, as part of their title. Enough of the record in such case to show a valid judgment, by the service of process, or appearance of the parties, is sufficient, and this copy produced, shews that the parties appeared.

It is also excepted to the sheriff's deed, that it does not recite the execution under which the sale was made, but only refers to it by description.

**M'GUIRE & C.
vs.
KOUNS.**

We suppose it must have been intended to complain, because the deed did not recite the execution *in hæc verba*. We do not conceive that the act of assembly, which directs the sheriff to recite in his deed, the execution under which he acted in the sale, intended to require the execution to be repeated word for word. A reference to, and description of, the execution reciting the material parts, such as its date, return, sum, parties, or the like, has been deemed sufficient; and deeds of that character have passed the ordeal of this court in silence, without ever supposing them defective because they did not repeat every word of the execution.

It is not necessary, in a sheriff's deed for land, to recite the execution word for word; but a reference to and description of the writ, reciting the material parts of it, is sufficient.

It was also objected, that the deed omits the names of two persons named in the execution, and that therefore their title could not have passed by the sale; and the court refused so to instruct the jury. On examining the deed, it does appear that in reciting the execution, the names of these persons are omitted. But this omission we conceive is not sufficient to make the deed inoperative as to their interest; because the deed shows that the sheriff sold all the title of the defendants in the execution, and the sheriff conveys the whole interest of all the defendants by the description of the heirs of Robert Johnson, and the omission to recite all the names in the execution, cannot vitiate the operation of the deed upon the title which the sheriff declares in his deed he has sold.

An omission of the names of part of the defendants, in the recital of the execution, is not material, where it recited the interest of all the defendants described as the heirs of R. J. was sold and conveyed.

Judgment affirmed with costs.

Triplett for appellant; *Brown* and *Depeu* for appellees.

CHANCERY.

Williams &c. vs. Vancleave &c.

Case 84.

Error to the Shelby Circuit; HENRY DAVIDGE, Judge.

Devises. Vested remainders. Contingent and lapsed devises.

June 18.

Chief Justice BIRN delivered the Opinion of the Court.

BENJAMIN VANCLEAVE died in 1819, having published his last will and testament, bearing date on the 17th October, 1815; which after his death, was duly proved, and admitted to record, in the county court of Shelby. This will and testament is as follows:—

Vancleave's
will.

“My first desire is, that my beloved wife, Ruth, and daughter-in-law, Polly Vancleave, jointly possess, use, and occupy the tract of land and plantation whereon I now live, containing one hundred and thirteen acres, during the natural life of my said wife, and after my wife's decease, if my said daughter-in-law shall not have again married, but still lives in her state of widowhood, my desire is, that she have the use of the land aforesaid, until her two children, Elijah and Elvira, shall arrive to the age of twenty one years, and then the said Elijah Vancleave, and his sister Elvira, to have the entire and absolute property thereof; but if it shall so happen, that either of my said grandchildren shall die without issue, the whole of the land to belong to the survivor, and in case both of them should decease without issue; then, and in that case, my said daughter-in-law to have the issue of the land aforesaid during her widowhood; and my special desire is, in case each of my said grandchildren dying without issue, and my said daughter-in-law marrying again, then the land aforesaid to be equally divided among my two daughters, Jane and Sally. *Item!* And my further desire is, that my said wife enjoy every other species of property I possess, during her life; and after her decease, to be equally divided among all my children; and lastly, I do hereby ordain, constitute and appoint my two sons, Aaron and Samuel, executors of this my last will and testament.”

In Sept. 1825, the appellees exhibited their bill, as part of the heirs of said Benjamin Vancleave, de-

ceased, against Joel Williams, and his wife Polly, the daughter-in-law mentioned in said will, and Elijah and Elvira her two children, alleging the death of said testator's wife, the marriage of said daughter-in-law, the will and testament aforesaid; alleging, that said Williams and wife were in possession, praying an account and decree against them for the rents and profits of the land so devised to the said daughter-in-law and her children, which had been received since the death of the testator's wife; the bill further asks for possession to be decreed to the complainants; and if it shall appear, that Elijah and Elvira are entitled to an equal portion of the land with the complainants, then that their shares may be set apart and allotted to them, and for general relief.

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&c.
vs.
VANCELEAVE
&c.

Allegations
and prayer of
the bill.

Williams and wife admit their intermarriage, and state it to have been after the date of the will, and before the death of the testator. Williams states, that, since the death of Mrs. Ruth Vancleave (which took place in the latter part of 1823 or the beginning of the year 1824,) he has, as guardian of the infant children, Elijah and Elvira, rented out the land, but denies that the complainants have any interest in the land, either by descent or devise.

Answer of
Williams and
wife.

The decree is against the defendants, for the rents of the year 1825; that they deliver up the bonds and notes for the rents of 1826; that they deliver possession of the tract of land to the complainants by the first day of January, 1827, and on failure, that a writ of *habere facias possessionem* be issued by the clerk.

Decree of the
circuit court.

To this the defendants below prosecute this writ of error.

It is not to be seen distinctly what quantum of interest in this tract of land is claimed for the complainants by their bill; whether that said daughter-in-law, Polly, by her marriage, had forfeited her particular estate only, so that the complainants were entitled until the two grandchildren arrived at the age of twenty one years, or that she had defeated, as well the remainder, after the life estate, devised

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&c.

to the grandchildren, as the contingent devise to Jane and Sally. The decree is general in behalf of the complainants, and tends in no degree to admit any right in the defendants, Elijah and Elvira, present, or to come.

Decree re-
versed.

Upon what principle the decree is based, so as, in case of intestacy, either until the infants, Elijah and Elvira, shall attain their ages of twenty one years, or of the whole estate in remainder, after the death of Mrs. Ruth Vancleave, and yet to exclude totally, those two grandchildren from all interest in the land, is not perceived. The decree must be reversed; but the question is what direction this court shall give, consequent upon that reversal.

Admitting all the facts as stated in the bill, touching the events which have happened since the date of the will, with the help of the additional facts supplied by the answer, and the question arises, whether the complainants can have any interest in this tract of land, living the grandchildren, Elvira and Elijah, mentioned in the said will.

Question
stated.

The question is, what interest and estate did Elijah and Elvira take in this tract of land? Was their interest in the remainder after the death of the testator's wife, Mrs. Ruth Vancleave, contingent upon the event that their mother should have remained a widow, so as to have been totally defeated by her second marriage? Or if not so contingent, was their interest to be postponed as to the possession and enjoyment until their arrival at the age of twenty one years, so that in the interim the interest descended to the heirs at law.

Either of these constructions are against the intention of the testator. He did not intend to die intestate, as to any portion of his estate, in this particular tract.

In this case—
devise of the
mansion
farm to testa-
tor's wife
and his son's
widow, for

Being the owner in fee, the testator gave to his wife and daughter-in-law, Polly, a joint estate for the life of his wife, with remainder to his two grandchildren Elijah and Elvira.

Out of this remainder, however, he carved an interest for his daughter-in-law, contingent upon the

event of her not having again married at the death of his wife, but still lived in her state of widowhood. It was the use devised to the daughter-in-law which was contingent upon her celibacy, and even that could not endure longer than the arrival of her children to their full age. But that contingency was not annexed to the remainder devised to the grandchildren. It was the exception out of the remainder to them which was, or was not, to be made, as the event should turn out.

Suppose the daughter-in-law had died, not having again married, living the testator's wife, who, (having survived her husband and daughter-in-law) had lived until after her two grandchildren, Elijah and Elvira, had attained their ages of twenty one years, and then the said grandmother had died; would it have consisted with the intent of the testator, that the grandchildren should, in such events, (possible at the date of his will, and which could not be foreseen,) be deprived of the remainder? This question is answered by that part of his will, in which he says, "and my special desire is, in case each of my said grandchildren dying without issue, and my said daughter-in-law marrying again, then the land aforesaid to be equally divided among my two daughters, Jane and Sally." This dying without issue, was the only event which the testator looked upon as giving this land to his other children.

The testator manifestly appropriated, in his mind and by his last will, this land to the use of his wife and daughter-in-law, during the life of his wife, and after her death to the permanent use and inheritance of his two grandchildren and their issue. Two principal objects in his will cannot be misunderstood: to provide certainly a house and home for his wife and his daughter-in-law during his wife's life; and after her death, to provide permanently for his two grandchildren, Elijah and Elvira, who were infants, and had lost their father. His wife might possibly have lived until after his two grandchildren attained their full age; he could not therefore have devised the land to them absolutely, before, or as soon as they attained full age, without

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&c.
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&c.

the wife's life, and after her death, if the daughter-in-law shall remain a widow, to her until her two children attain full age, then to them in fee—if the daughter-in-law marry before the wife die, the estate vests in the grandchildren immediately on the wife's death.

WILLIAMS
&c.
vs.
VANCELEAVE
&c.

incurring the risk of depriving his wife of her home, or of subjecting her to her cradle. Therefore, the devise to the grandchildren, is after his wife's death. The provision for his daughter-in-law, after the death of his wife, was but a minor consideration compared with his desire to provide effectually for his fatherless grandchildren.

Objects of
the testator
considered.

To the natural affections of the grandmother and the mother combined, the testator was willing to confide the support of his two grandchildren; he doubted not their apportionment of the issues and profits of the land, and division of them with his grand children in the life time of his wife. But after the death of his wife, he was not willing to risk the support of his grandchildren with a step-father. If she married again, she having the support of her husband, would less need the support from the estate of the testator, but such change in her condition would materially diminish the civil powers of his daughter-in-law to appropriate her means and estate to the support and education of his grandchildren. Therefore the testator, after the death of his wife, annexed a condition, to his daughter-in-law's further use and enjoyment of the land, that she lives in her state of widowhood.

By devising the use of the land to the mother, the natural guardian of the children, during their minority, provided she still lived in her state of widowhood, the testator was but accomplishing the better his provision for his grandchildren; they could not manage it themselves; the mother could, for herself and them. The testator very naturally considered the use of the land devised to a widowed daughter-in-law, as substantially devised to the use of her children also, during their minority, whilst natural affection and legal obligation combined to impose the duty of support and maintenance. And therefore, the testator said, "And after my wife's decease, if my said daughter-in-law shall not have again married, but still lives in her state of widowhood, my desire is, that she have the use of the land aforesaid until her two children, Elijah and Elvira, shall arrive to the age of twenty one

years, and then the said Elijah Vancleave and his sister Elvira, to have the entire and absolute property thereof." "Entire" signifies undivided, unmingled, complete in all its parts; "absolute" means free, not controlled by others. These expressions "entire and absolute property thereof," connected with the minority of the children and the condition that the mother had not married again, but still lives in her state of widowhood, by necessary implication, convince the mind that the testator viewed the use of the land given to the mother as mingled with the use and enjoyment of the grandchildren for the time, and that he imposed the condition of celibacy for the benefit of the children, not for their detriment, to enlarge and not to defeat their estate. To suppose that the testator, by the annexation of this condition to the use devised to his daughter-in-law, intended to deprive his two grandchildren of support during their minority, because their mother should happen to marry and thereby subject them to the control of a step-father; that the grandfather intended to deprive them of support when they would most need it, would be a forced and unnatural construction of the will.

WILLIAMS
&c.
vs.
VANCELAVE
&c.

All the provisions by the testator, relating to this tract of land, are comprized in one long sentence, which, abbreviated, by the omission of so much as relates to the provision contingently given to the daughter-in-law, will stand thus:

Substance of
the devise, as
applicable to
the facts since
occurred.

"My first desire is, that my beloved wife, Ruth, and daughter-in-law, Polly Vancleave, jointly possess, use and occupy the tract of land and plantation whereon I now live, containing one hundred and thirteen acres, during the natural life of my said wife, and then the said Elijah Vancleave and his sister Elvira, to have the entire and absolute property thereof."

This is the true reading of the will when applied to the state of facts which have transpired since its date.

That the interest of the daughter-in-law, when forfeited by her marriage, lapsed for the benefit of

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&c.
vs.
VANCELEAVE
&c.

the remainder, devised to the grandchildren; that the remainder to them was vested immediately upon the death of the testator, and did not depend upon the contingency of their mother's remaining unmarried, are propositions to be collected from the will. That such was the testator's intention is a necessary implication, strongly inculcated by the words which he has used. This construction is fortified by analogy to many adjudged cases. Boraston's case, 3 Co. 19; Taylor vs. Biddal, 2 Mod. 289; Hayward vs. Whitley, 1 Burr. 228, and Tompkins and Tomkins, cited in that case by lord Mansfield; Dugard vs. Mansfield, Equ. ca. ab. 195, pl. 4; and many modern cases, which in this court must be ~~irrefragable~~ ^{irrefragable}.

Mandate. It is the opinion of this court, that the complainants, claiming as the heirs at law, of Benjamin Vancleave, the testator, a supposed undivided portion of the estate in the home plantation and tract of land, have misinterpreted the will, and that, living the defendants, Elijah and Elvira, the complainants have no right to the said land, or the rents and profits. It is therefore ordered and decreed, that the said decree of the circuit court be reversed, and that the case be remanded, with directions to dismiss the bill with costs.

Plaintiffs in this court to be paid their costs.

Mayer for plaintiffs; *Denny* for defendants.

7th 394
121 553
ASSAULT &
BATTERY.

Case 85.

Trimble vs. Spiller.

Error to the Clarke Circuit; GEORGE SHANNON, Judge.

Damages. Husband and Wife.

June 18.

Judge OWSLEY delivered the Opinion of the Court.

SPILLER sued Trimble and wife, and declared against them for a trespass, assault and battery, committed by Mrs. Trimble upon the daughter of Spiller, by which he sustained great loss of service, &c.

Evidence.

At the trial in the circuit court, after the battery

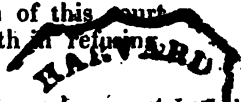
as charged in the declaration was proved, under circumstances highly aggravated and injurious to the feelings of Spiller, and derogatory to the character of his family, Trimble moved the court to instruct the jury, that in their estimate of damages they could not regard the disgrace of Spiller or his family which resulted from the battery. But his motion was overruled, and the jury were instructed, that, in estimating the damages, they had a right to consider the injury to the feelings of the parents, and the character of the family, occasioned by the assault and battery proved.

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VS.
SPILLER.

Instructions.

The question for the determination of this court is, was the circuit court correct, both in refusing, and in giving the instructions.

In our researches upon the subject, we have met with no reported case in which such a question, in an action like the present, has ever undergone a direct adjudication. But cases are to be found, in which questions turning upon analogous principles, have been decided, and which are understood to sustain the decision of the circuit court. The legal foundation of the action is the same, whether it be brought by a parent for the seduction, or battery, of his daughter. If there be a loss to the parent of the service of his child, he has an unquestionable right to maintain the action in either case, and in neither case is he allowed to recover without proof of the loss of service, or what, by construction of law, is equivalent thereto. The loss of service is not, however, admitted to form the sole and exclusive consideration for the jury, in estimating damages, in either case. There is no principle that can limit the jury, in their estimate of damages, to the amount of damages from loss of service, occasioned by a battery on the child, that would not equally apply to the estimate of damages occasioned by the seduction of the daughter; and the rule is well settled, that, in an action by a parent for the seduction of his child, the jury are not confined in their estimate of damages to the mere amount of the damage from loss of service, and the expense consequent upon the seduction, but may award compen-



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vs.
SPILLER.

sation for the dishonor and disgrace cast upon the plaintiff and his family by such an injury. 3 Starkie's Evi. 1308.

Hence we infer that there is no error, either in refusing, or giving, the instructions to the jury. The judgment is consequently affirmed, with cost and damages.

J. Speed Smith for plaintiff; Crittenden for defendant.

CHANCERY.

Brown, Slater &c. vs. Wright.

Case 86.

Error to the Logan Circuit; HENRY P. BROADNAX, Judge.

Principal and surety. Rescission of Contracts. Novations.

June 18.

Judge MILLS delivered the Opinion of the Court.

Judgment at law against complainant.

LILBURN WRIGHT filed his bill, to be relieved against three judgments at law, founded on three notes executed by him as surety for Robert A. Wright, Jesse T. Wright being another co-surety, to George Brown. One of these notes was assigned by Brown to H. Slater, and the other two retained by Brown, and on all, separate judgments were obtained against Lilburn Wright only. His equity, on which he relies for relief, may be summed up under the following heads to-wit:

Grounds relied on in the bill for injunction.

That George Brown was one of several proprietors of the town of Cumberland, in Tennessee, as laid off, and the lots in which were sold out by said proprietors; and in the division of the notes of the purchasers among the proprietors, these in question fell to Brown, and each was given for the purchase of lots in said town, made by Robert A. Wright at the public sale of lots; and it was represented at the said sale by the proprietors—

1st, That shortly after the sale, the proprietors would build a bridge across Red river, which would greatly increase the value of lots in the town; and also, that they would build convenient and commodious warehouses in the town; which deluded the bidders, and lots were sold for hundreds of dollars, that were not worth as many cents:

2, That the proprietors had many secret by-bidders for the lots, and the auctioneer himself would cry bid after bid, when it was unknown whence the bid came; and in fact the bids were made by the auctioneer himself, by secret instructions from the proprietors:

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vs.
WRIGHT

3, That, as the complainant is advised, George Brown, and the remaining proprietors of the town, had not at the time of the sale a good and sufficient title to the land, on which the said town was established.

4, That said proprietors failed to give any writing evidencing the sale of lots at the time of sale, whereby the sale was void by the statute of frauds and perjuries.

He insists that the proprietors failed in performing those things, such as the bridge and warehouses, which they held out as inducements to the purchasing of lots; that the town is abandoned and is a common.

He makes the principal, Robert A. Wright, and Parties. his co-surety, as well as Brown and Slater, defendants to this bill, and advertised against his principal as a non-resident, and took the bill as confessed.

Brown and Slater both answered the bill, denying the equity, and contesting the complainant's right to relief.

Brown and
Slater's answer.

The court perpetuated the injunction, and gave complete relief against the whole demand.

Decree of the
circuit court.

If we waive the objections against this decree of a perpetual injunction, without setting aside the contract in toto, we cannot perceive on what principle the court below could have given relief to the surety, on the equity set up, without that relief being asked by the principal. The principal, it is true is made a defendant; but it is not even suggested in the bill, that he resists the fulfilment of the contract, or desires relief from it. The grounds relied on, are fraud, delusion, and failure of consideration, for the purpose of setting aside the contract. It is not

Surety of the purchaser cannot, on the bill and prayer of himself only, obtain relief against his obligation on the ground of fraud in the sale, without shewing his principal and

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vs.
WRIGHT

vendor had
 combined to
 defraud him.

rest on the election of the principal, whether he will, or will not avail, himself of these grounds, if they exist. He still has a right to waive this equity and insist on a fulfilment, and his surety has not a right to make that election for him. Indeed, so far as the bill in this case shows, it is not even the surety forcing the principal into the measure of setting aside the contract, but it is an attempt on the part of the surety to relieve himself by the equity of a supposed fraud on his principal, leaving his principal hereafter to act as he chooses; and not only the principal, hereafter, but the co-surety, has a right each to their bill for relief, or a right to waive the equity. It is, in general, true, that a surety, where the defence rests in an equity against the contract, follows the fate of the principal, and is bound when the principal is bound, and released, when the principal is released; and there are cases, where if the contract be voidable only in equity, and that at the election of the principal, the surety cannot make that election for him, and such we conceive this case to be. Whether in such cases, if the principal should refuse to make the defence, by way of a fraud on his surety, and combination with the opposite party, there might not still be relief granted to the surety, we need not now determine. For if there be such, the fraud and collusion, or combination ought to be charged in the bill and made out in evidence; and here there is no attempt to do so. We therefore conceive, that under the circumstances of this case, the complainant cannot avail himself of the equity which he has set up.

A novation
 between the
 principal and
 creditor,
 whereby time
 is given, to
 the prejudice
 of the surety,
 discharges
 him.

But there is another ground, or other grounds, of equity set up in the bill against both Slater and Brown, which are proper for a surety to avail himself of, and which could be of no avail to the principal. That is the following:

That Brown made a new agreement with the principal, without consent of the surety, whereby day was given to the principal, to the prejudice of the surety. It is likewise alleged, that Slater had made a like agreement with Robert A. Wright, the principal, to the prejudice of the surety.

That such agreements may operate in equity to discharge the surety, has been often held by this court, as well as other courts of equity. But it is essential to such a discharge, that the contract with the principal should be made clearly to appear, and that it was so prejudicial to the surety in its tendency, that the obligee ought to be compelled to rely upon it, and not to be allowed to resort again to the surety. But in this case, the agreements on the part of both Brown and Slater with the principal, Robert A. Wright, were conditional only, dependant on the compliance of Robert A. Wright, and had he complied, the said agreements would have operated to the benefit of the surety. He did not comply, and there is no proof conducing to show, that by said agreements any lapse of time took place prejudicial to the surety. Indeed the case on this ground of equity is very deficient in point of proof of the facts charged, so much so, that it cannot be perceived clearly what the agreements were, and how they operated to the prejudice of the surety.

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vs.
WRIGHT

In such case, the new contract must be such, that the obligee ought to be compelled to rely on it, and not resort to the surety.

The decree must be reversed with costs and the cause be remanded, with directions to dissolve the injunction, and dismiss the bill with costs and damages.

Mayer and Crittenden for plaintiffs; *Pope and Monroe* for defendants.

Price vs. Ford.

EJECTMENT

Error to the Floyd Circuit; SILAS W. ROBBINS, Judge

Case 87.

Surprise. New trial.

Chief Justice BISS, delivered the opinion of the court.

June 19.

It seems to this court, that the unexpected trial and verdict, before the defendant arrived, although by twelve o'clock of the first day of the term; the absence of witnesses summoned to prove adverse possession of upwards of twenty years under a conflicting title, which adverse possession, must also have been under an elder grant, (for the patent of Madison, under which the de-

New trial awarded, against the decision of the circuit court, on the ground of surprise, by the early trial of

PRICE
vs.
FORD

the cause, before defendant's arrival at court, and the absence of witnesses.

defendant claims, is elder than that of Graham, under which the plaintiff claims,) were sufficient causes for setting aside the verdict and judgment, and granting the defendant in ejectment a new trial. As the other points stated in the bill of exceptions may not occur again on the trial, the court expresses no opinion on them.

Judgment reversed, and cause remanded for a *re-nuere facias de novo*.

Plaintiff in this court to recover his costs.

Triplett for plaintiff; *Mayer* for defendant.

DEBT.

Noel and Pope vs. Bank of Kentucky.

Case 88

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Process. Debt, on bills of exchange. Amendments.

June 19

Judge MILLS delivered the Opinion of the Court.

Execution of process after the return day, is nought.

THIS is a joint action, against the maker and endorser of a promissory note, negotiated in bank. The writ was sent to a distant county to be served on the endorser. The bank had judgment by default. The following errors appear in the proceedings.

Actions of debt on notes discounted at Bank of Ky. made bills of exchange, against principal and endorser, must be for the debt, interest and costs of protest, and not maintainable for debt only.

1st. The writ on the endorser was executed after the return day. The return day was the 10th of October, 1825, and the day of execution was the 12th of the same month. For this reason no judgment ought to have been given.

2nd. As the action is a joint one against drawer and endorser, it is statutory, and must go for the debt and interest, and costs of protest; and the party has brought it for the debt only. The action, for this reason, cannot be sustained, nor can there be further proceedings on the return of the cause.

Judgment reversed with costs, and cause remanded, with directions to dismiss the suit, with costs.

Monroe for appellants; *Crittenden* for appellees.

Legrand vs. Page.

CASE.

Error to the Logan Circuit; HENRY P. BROADNAX, Judge

Case 99.

Pleading. Probable cause.

Judge OWSLEY delivered the opinion of the court.

June 20.

It seems to the court, that there is error in the judgment sustaining the pleas of the defendant, because neither plea sets out the felony alleged to have been committed; nor does either state the facts, upon which the defendant was induced to suspect the plaintiff, so as to enable the court to judge whether there was reasonable and probable cause for the arrest complained of in the declaration.

Plea of probable cause, must set out the facts on which defendant prosecuted, that the court may judge.

It was also erroneous, even if the pleas had been correctly adjudged sufficient, to render judgment in favor of the defendants, who failed to unite in either plea, and made no defence to the action.

If part of the defendants in an action for malicious prosecution, fail to plead, judgment must go against them, notwithstanding the sufficient plea of the others.

The judgment is reversed, with cost; the cause remanded to the court below, and judgment there entered in favor of the plaintiff, on the demurrer to the pleas, unless the defendant shall ask leave to amend his pleas, and such other and further proceedings be there had as may not be inconsistent with this opinion, and the principles of law.

Monroe for plaintiff.

Lansdale's adm'rs. and heirs vs. Cox.

MOTION.

Error to the Nelson Circuit; PAUL I. BOOKER, Judge.

Case 91.

Sureties. Contribution. Jurisdiction. Statutes. Motions. Ex'ors and heirs.

Chief Justice BIBB delivered the opinion of the court.

June 21.

RICHARD LANSDALE and JAMES COX were the sureties of Shanks, in an injunction bond to Summers, who sued Cox, the surviving obligor, and had judgment for \$730 24, besides costs, which was paid by Cox's surety in a replevin bond, and afterwards paid by Cox to his surety. These proceedings were in the Nelson circuit court.

Judgment against Cox, the survivor of Lansdale, his co-surety of Shanks, paid by Cox's sureties in a replevin bond, and

Cox thereafter, upon motion against the heirs of
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LANSDALE'S
adm'r's &c.

vs.
Cox.

then by Cox
to his sureties.

Cox has judgment
against
Shanks, the
principal, but
fails to recover
the money.

Judgment on
motion by
Cox, against
Lansdale's
adm'r's and
heirs.

Statute giving the motion.

Remedy against heirs
&c. on the
contract of
their ancestors at common law.

Shanks, the principal, (stating that there was no executor or administrator of Shanks,) had judgment, and execution, upon which the sheriff made a small part of the judgment, (about \$35 19,) and returned that he could find no estate whereof to satisfy the residue.

Cox then sued his motion against the heirs and administrators, jointly, of his co-security, Lansdale, for contribution, and recovered judgment; to which the defendants prosecute this writ of error.

The first question made in the court below, and now presented for the consideration of this court, is, will this motion be sustained, jointly, against the heirs and administrators, by a co-security?

This question depends upon the second section of the act of 1798; (2 Litt. Ed. laws Ken. p. 37; 2 Dig. 1116,) entitled "An act to empower sureties to recover damages in a summary way," which provides the remedy by motion in behalf of one security against his co-security, where the principal obligor hath become insolvent, and judgment hath been obtained against one or more of the securities jointly bound with the principal obligor or obligors, in any bond, bill, note, or obligation for the payment of money or other thing. The words of the statute which relate to this question are, "—it shall and may be lawful for the court before whom such judgment was or shall be obtained, upon motion of the party or parties against whom judgment hath been entered up as securities as aforesaid, to grant judgment and award execution against all and every of the obligors, and their legal representatives, for their, and each of their respective shares and proportions of the said debt."

The remedy by suit jointly against the personal representatives and heirs of a debtor, is unknown to the common law. If the heirs were expressly bound by the obligation, then a suit might be prosecuted against them upon the obligation of their ancestor. The executor or administrator is bound, whether expressly named or not, for the debt or duty of the testator or intestate, no matter whether

that debt or duty arise by specialty, or simple contract, express or implied.

LANSDALE'S
adm'rs &c.
vs.

Cox.

But by our statute of 1792, for subjecting lands to sale by executions upon judgments; 1 Litt. 128, 1 Dig. p. 652,) it is declared, that "the same actions which will lie against executors or administrators, may be brought jointly against them and the heirs and devisees of the dead person, or both." Upon this statute the construction is, that the suit must be jointly against the executor or administrator and the heir, upon a contract where the heir was not bound by the common law. The common law remedies, against executors and administrators, and against the heirs, remain. But to come at the heirs upon a contract of the ancestor, for which they were not bound by the common law, the action upon this statute must be against the heirs, jointly with the executors or administrators.

Actions given
by the statute
against the
executors
and heirs.

The whole doctrine of contribution between securities originated with courts of equity. There is no express contract for contribution; the bonds, obligations, bills, or notes, created liabilities from the obligors to the obligees. The contribution between co-securities results from the maxim, that equality is equity. Proceeding on this, a surety is entitled to every remedy which the creditor has against the principal debtor; to stand in the place of the creditor; to enforce every security, and all means of payment; to have those securities transferred to him, though there was no stipulation for that. This right of a surety stands upon a principle of natural justice. The creditor may resort to principal, to either of the securities, for the whole, or to each for his proportion, and as he has that right, if he, from partiality to one surety, or for other cause, will not enforce it, the court of equity gives the same right to the other surety, and enables him to enforce it. Natural justice says that one surety having become so with other sureties, shall not have the whole debt thrown upon him by the choice of the creditor, in not resorting to remedies in his power, without having contribution from those who entered into the obligation equally with him. This obligation of co-

Remedy of
one surety
against another for contribution was
anciently in
equity only,
but the common law
courts now
entertain the
jurisdiction.

LANSDALE'S
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COX.

securities to contribute to each other, is not founded in contract between them, but stood upon a principle of equity, until that principle of equity had been so universally acknowledged, that courts of law, in modern times, have assumed jurisdiction. This jurisdiction of the courts of common law is based upon the idea, that the equitable principle had been so long and so generally acknowledged, and enforced, that persons, in placing themselves under circumstances to which it applies, may be supposed to act under the dominion of contract, implied from the universality of that principle. For a great length of time, equity exercised its jurisdiction exclusively and undividedly; the jurisdiction assumed by courts of law is, comparatively, of very modern date; and is attended with great difficulty where there are many sureties; though simple and easy enough where there are but two sureties, one of whom brings his action against the other upon the implied assumpsit for a moiety.

Action at law by one surety against another for contribution, is on the implied simple contract, and not maintainable against the heirs only, but is given by the statute against them and the ex'rs and adm'r's jointly.

The action at law, then, by one surety against his co-security, arises out of an implied undertaking, not by force of express contract, and consequently the heirs cannot have been expressly bound by the ancestor. So that the action at law, by one surety against the representatives of a deceased co-surety, must, by the principles of the common law, be against the executor or administrator. To reach the heirs in a suit at law, the remedy given by our statute, in such cases, must be jointly against the executors or administrators and heirs, not against the heirs alone. The remedy in equity by substitution of the co-security in place of the creditor, and so allowing the one surety his redress against his co-surety or co-sureties for contribution, still remains; the remedy at law, by a regular action jointly against the heirs and executors or administrators, by force and operation of the statute of 1792, may be pursued.

Motion given by the statute in such case to one surety

In tracing these remedies to their foundation, we have endeavored to find the true construction of the statute of 1778, which authorizes the remedy by motion by a surety against the representatives of

a deceased co-surety; and we have to acknowledge the difficulty which we have perceived and sensibly felt, in coming to a decisive opinion as to the sense in which the legislature used the term "legal representatives." If it be construed to mean the heirs only, then the executors and administrators are not to be reached by motion; if it means the executors or administrators, only, then the heirs are not to be reached in this form of proceeding; if it mean both heir and executor or administrator, then neither can be proceeded against by motion, without joining the other. These statutory remedies by summary proceeding, in derogation of the common law and common right, have always been construed strictly, and never have been extended beyond the very expressions of the statute. Taking the expression, "legal representatives," in its more general signification, as synonymous with lawful, it may mean the lawful representatives of the real estate, or the lawful representatives of the personal estate of the deceased. As the undertaking between sureties to make contribution, is an implied assumpsit, which properly applies to, and devolves upon, the executor or administrator, but does not devolve upon the heir, it seems more proper to render this expression in the statute according to the subject matter; and to refer the word "representatives" to the executors and administrators who lawfully represent and are bound by the implied assumpsit of the deceased, than to the heirs.

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adm'rs & c.

vs.

Cox.

for contribution against the other and his "legal representatives," lies against the ex'or or adm'r only, and does not embrace the heirs.

This construction is favored by the history of this provision. It is copied from the statute of Virginia of 1786, chap. 15, under which motions have been sustained against executors and administrators of a deceased security, in favor of a security. It was the language used by the legislature of Virginia, where the heirs were not bound by the implied assumpsit of their ancestor, neither by common law nor by statute. It was in force before our separation from Virginia, and had received a meaning by use and common understanding. The act of 1798 was but a re-publication of a pre-existing law, and it is not fair to presume that the same words have undergone a change of signification by the mere fact of

Such was the construction of the statute of Virginia, of which the act of 1796 is but a re-enactment.

LANSDALE'S
adm'rs &c.
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COX.

reiteration. To confine the motion in this and such like cases to the executors or administrators, will make it more simple, convenient, and best suited to the habits of society. Its simplicity will render the remedy less liable to mistake in the inception or to error in its progress and consummation.

It will be adequate in a great majority of the cases; and where this remedy might prove inadequate, the action by regular process of law, according to the statute of 1792, against heirs and executors or administrators jointly, or by bill in equity, may be resorted to.

Heirs in such cases may be subjected by the formal action or bill in equity.

It seems to this court, that the remedy in the court below was misconceived; that the motion jointly against the heirs and administrators of one co-security did not lie in favor of the other co-security, for contribution. It is therefore considered by this court, that the judgment of the circuit court be reversed, and the case be remanded to that court, with direction to quash the notice, and dismiss the motion with costs.

Plaintiffs in this court to recover costs.

Mayes and Chapeze for plaintiffs; *Hardin and Darby* for defendants.

EJECTMENT.

Sliger &c. vs. Grants.

Case 92.

Error to the Scott Circuit; JESSE BLEDSOE, Judge

Discontinuance. Notice to tenant in possession.

June 20.

Judge OWSEN delivered the opinion of the court.

In ejectment, the declaration must be filed and entered on the records of the court at the term the tenant is warned to appear on the case, is not in court.

THE declaration, and notice thereto attached, not having been noticed on the record at the term to which the tenants were warned to appear, though filed with the clerk of the court before the appearance term, it was erroneous at a subsequent term to proceed in the cause, and by common order, take judgment against the casual ejector: 3 Mar. R. 551.

It is the opinion of a majority of the court, Judge MILLS dissenting, that the judgment must be reversed, with cost.

Robinson for plaintiff; *Chambers* for defendant.

Ross vs. Neal.

CASE.

Error to the Whitley Circuit; JOSEPH EVE, Judge.

Case 93.

Error. Probable cause. Juries. New trial.

Judge MILLS delivered the Opinion of the Court.

June 21.

THIS is an action for malicious prosecution, and a verdict and judgment for the plaintiff below.

The defendant pleaded one plea, which we conceive amounts to a justification of the prosecution; as it asserts that the criminal charge, for which the plaintiff was prosecuted, was true. He also pleaded another plea, which fully amounted to a plea of probable cause for the prosecution. Both these pleas were demurred to, and were overruled as insufficient; and this is relied on as sufficient to reverse the judgment. We should have no hesitation in reversing the judgment on this ground, were it not that something else appears in the record calculated to cure, or render entirely harmless this error.

Not error to the prejudice of the defendant and available here, that the court sustained a demurrer to a sufficient plea of justification, or a probable cause, filed with other pleas of the same effect on which issue was taken, and the cause tried.

The defendant had previously pleaded two pleas, one of which in substance completely amounted to the same justification, contained in his plea of that character which was overruled; and the other contained substantially the same probable cause contained in the like plea which was overruled. To both of these previous pleas, there were general replications and issues to the country, which were tried before the jury. In addition to this, there was a plea of not guilty, under which probable cause could, according to well settled principles, have been given in evidence. If we, therefore, were to reverse the judgment, because of his two pleas of the same nature having been overruled, we should and could place him in no better situation, and his adversary in no worse, than they actually stood on the trial. We conceive it would be too technical to set aside a verdict and judgment for an error that could not have prejudiced the party complaining. In the term of events, he was relieved in the court below from all effects of the error upon him, and his redress for the error in that court being complete, he ought not to have a double redress.

Ross
vs.
NEAL.

Otherwise, perhaps, if the defendant had offered, with the plea that was overruled, the general issue only.

If the court had overruled the special pleas because they amounted to the general issue alone, as the party had a right to have his probable cause adjudged of by the court on a proper plea for that purpose, there might be some plausibility in contending that the judgment ought to be reversed, notwithstanding he might have availed himself of the same defence, by way of evidence under the general issue. But here even that ground is not left; for by special pleas, previously pleaded and answered, he had all the advantage that special pleas could afford him.

Probable cause may be given in evidence or pleaded.

It would have been more proper for the court below to have rejected the last pleas, as surplussage, and thus have simplified the record, instead of overruling them, on demurrer, as insufficient pleas. But as the record really is, the court, by not permitting the defendant to have the benefit of the same matter a second time, has only done an act, rightful in its result, in a wrong mode.

Where two pleas are offered of the same effect, the court may reject one as surplusage.

The remaining error is, that there were thirteen jurors who tried the cause, and so it appears from the record.

It must be admitted, that twelve is the right number in such a case as this, and if there were not twelve, but a deficit in the number, it might vitiate the verdict as no verdict.

Deficit in the number of the jury, may, it seems, be assigned for error. But—

But here, the party had his twelve, and one more, and the complaint is, an excess in number, and the grounds of it must be, that the verdict was liable to be influenced by at least one more person, than the law allowed to be in the jury room, acting upon the case.

Objection that there were 13 jurors, must be made in the court below, in a motion for a new trial, and not here for the first time.

If this exception to the verdict had been taken in the inferior court, we have no doubt it must have vitiated the verdict. It must have been known there, and yet the party was silent and took no exception on that account. Can he be permitted to take the exception in this court for the first time? It is only an improper influence upon the verdict, of which he can complain, and that influence by one man too many, was exercised upon the real number.

under the sanctions of an oath, for the whole thirteen were equally sworn. Now let us suppose that it should appear from a record here, that there had been one or more persons present in the jury room as intruders, acting upon the jury, during their deliberations, and inducing them to find their verdict in a particular way, and that the party against whom the verdict was found, had taken no exceptions to the verdict in the court below on that account, would it be proper to permit him to attack the verdict here for the first time? We conceive not.

Ross
vs.
NEAL.

It ought to be taken, that he had waived the objection, and that he had supposed the presence of those intruders had done him no injury. So here it ought to be presumed that the parties waived the exception; although the record is silent on that point. For the fact must have been known and understood, by both, as well as by the court, who might have interfered, *ex officio*, if the parties, by their acquiescence, had not rendered such interference improper. On this ground, therefore, the judgment ought not to be reversed, and it is affirmed, with costs, &c.

It shall be taken that the objection was waived, for otherwise the court, *ex officio*, might have interfered, which would have been improper when the parties acquiesced.

Triplett for plaintiff; *Crittenden* for defendant.

Forean vs. Bowen.

COVENANT.

Appeal from the Christian Circuit; BEN. SHACKELFORD, Judge.

CASE 93.

Damages. Trial by jury. Bank note contracts. Mistake.

Consideration. Pleading by defendant. Jurisdiction.

Equity.

Judge OWSLEY delivered the Opinion of the Court.

June 21.

BOWEN sued Forean in covenant, on the following writing:

On or before the 7th day of April next, I, George Forean, promise to pay Arthur M. Bowen, the just sum of one thousand five hundred and fifty five dollars and seventy two cents, in notes on the bank of the commonwealth of Kentucky, for value received, as witness my hand and seal, this 3rd day of December, 1823.

Covenant declared on.

George Forean, [Seal.]

FOREAN
vs.
BOWEN.

Declaration.

Pleas with-
drawn.

Judgment by
default, for
the nominal
amount of
the covenant
for bank
notes, with
interest, with-
out a jury.

In covenant
on a bank
note con-
tract, not
within the
act allowing
a recovery in
kind, there
must be a
jury.

The declaration sets out the covenant sufficiently precise, and alleges for breach, the nonpayment of the bank paper at the day stipulated for its payment.

Four pleas were presented by Forean, one of which was rejected by the court, another was demurred to by Bowen, and adjudged bad by the court; and upon the other two, issues to the country were made up by the parties, but by permission of the court they were afterwards withdrawn by Forean.

The pleas having been thus disposed of, judgment was rendered by the court, without the intervention of a jury, "that Bowen, the plaintiff in that court, recover of Forean, the defendant there, one thousand five hundred and fifty-five dollars and seventy-two cents, the debt in the declaration mentioned, with interest thereon, to be computed at the rate of six per centum per annum, from the 7th of April, 1824, until paid, and also his cost by him about his suit in this behalf expended."

From that judgment Forean appealed.

The judgment is undoubtedly erroneously rendered. It was not only irregular, to render judgment for the nominal amount of the commonwealth's paper mentioned in the covenant, as for so much debt, and interest thereon, but there should have been no judgment for any specific sum, without the intervention of a Jury to assess the damages. The amount of damages to which Bowen became entitled to recover, for a breach of the covenant sued on, is not to be ascertained by inspection of the covenant, but depends on the value of the bank paper at the time it was payable, and of which value it is the province of a jury and not the court, upon evidence *aliunde*, to ascertain and assess. The court might, no doubt, without the intervention of a jury, render judgment for the nominal amount in notes of the bank, when the action is founded on a contract coming within the act which allows the recovery of bank paper, if by endorsing upon his declaration the plaintiff declares his willingness to accept bank

paper, but the writing upon which this suit is founded was executed before the passage of the act, and is not therefore within the act.

FOREAN
vs.
BOWEN.

But there are other questions, besides those which relate to the regularity of entering the judgment made by the assignment of errors; one of which, and one only, will however be noticed.

In cases within the statute, where the plaintiff endorses he will receive the bank paper, no jury is necessary to assess the damages.

The others are so obviously and palpably against Forean, that even to notice them would give them a consequence which the most zealous advocate cannot be presumed to suppose them entitled to.

The question we shall notice involves the validity of the third plea, which was adjudged bad on demurrer by the circuit court. It is as follows:

"The defendant, Forean, comes, &c. and for plea says, the plaintiff Bowen, his action aforesaid against him to have and maintain, ought not, as to two hundred and eighty dollars of the debt in the declaration mentioned; because, he says, that heretofore, to-wit: on the 14th day of March, 1822, at the circuit, &c. it was agreed between a certain Peter Forean, the son of this defendant and the plaintiff, that the said Peter Forean should freight for the plaintiff from Boyd's landing in this circuit, to the New Orleans market, twenty eight hogsheads of Tobacco, and should sell the same for the best price which could be got therefor in the New Orleans market, and after deducting ten dollars for each hogshead, out of the amount for which the tobacco might sell, for the freight thereof, he, the said Peter Forean should pay over the balance of the price of said tobacco to the plaintiff, and the defendant avers that the said Peter Forean did freight said twenty-eight hogsheads of tobacco, from Boyd's landing aforesaid to the New Orleans market, for the plaintiff, and that he did there sell the same for the best price which could be had for it, and in a few days afterwards died there. And the defendant further avers, that the covenant sued upon was executed by him to the plaintiff, as the price of the whole of said tobacco, and for no other or further consideration; and that by mistake the same was executed for the

Plea alleging a mistake in the covenant declared on.

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vs.
BOWEN.

entire price of said tobacco, without deducting therefrom the amount of ten dollars per hogshead, for freight, as aforesaid, and this he is ready to verify, &c.

Defence, that the covenant was executed by mistake for too great a sum, cannot be made at law; the remedy is in equity. Otherwise, it seems, where the defence goes the whole action.

None will deny but that Forean ought, in moral justice, to be relieved from the payment of the two hundred and eighty dollars, to which his plea purports to be an answer, if, in point of fact, the allegations contained in his plea be true; but we apprehend, that to obtain relief, he must apply to a court of equity, and cannot, in the mode adopted by him, avail himself of the matter by plea at law. If the mistake alleged in the plea went to the whole consideration of the obligation, there would be no difficulty, under the laws of this country, in sustaining the defence at law; but the object of the plea is, to go into part of the consideration only, and such a plea has been repeatedly decided not to be allowable at law. The plea was, therefore, correctly adjudged bad by the circuit court.

The judgment against Forean must, however, for the reasons first assigned, be reversed with cost, and the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

Mays for appellant; *Crittenden* for appellee.

DEBT

Pope vs. Wickliffe.

Case 94.

Appeal from the Bullitt Circuit; PAUL I. BOOKER, Judge.

Executors &c. Devastated. Notice. Creditors. Statutes.

June 21.

Judge OWSLEY delivered the Opinion of the Court.

Case stated.

POPE administered on the estate of Josiah M. Anderson, deceased, and within less than six months after administration was granted to him, he paid two demands which were owing by the intestate. One of these demands was owing to John M. Beckwith, and amounted to \$53 12 1-2 cents. The other was owing to H. Oldham, and was for twenty-five dollars.

After the expiration of six months from the grant of administration, Pope, as administrator of the estate of said Anderson, confessed judgment to Wickliffe for \$100, with interest and cost. An execution issued in favor of Wickliffe, upon the judgment, and was returned by the sheriff, no property found. Suit was then brought by Wickliffe against Pope on the judgment, suggesting a *devastavit*. *Nil debet* and *plene administravit* were pleaded by Pope, and issues joined to each plea by Wickliffe.

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vs.
WICKLIFFE.

On the trial of these issues, Pope relied upon the payments which he made to Beckwith and Oldham, in support of his plea of *plene administravit*, but the court being of opinion that, as administrator, Pope should not have made those payments within six months from the grant of administration to him, instructed the jury, in substance, that they ought to disregard the payments, if they should believe that they were made within six months after the grant of administration, and if they should also believe that Pope had notice of Wickliffe's demand within the six months, though at the time of making the payments he had no knowledge of the debt of Wickliffe.

The instruction cannot, we apprehend, be sustained. The law has prescribed the order which, in case of deficiency of assets, it is incumbent upon executors or administrators to observe in the payment of debts owing by the testator or intestate; and if, instead of pursuing that order, the executor or administrator, with notice of debts of superior dignity, pays others inferior in degree, he will be liable as for a *devastavit*. But to incur a liability of that sort, he must, at the time of paying the inferior debt, have notice of the existence of the debt of superior degree.

Executor is not liable as for a *devastavit* for paying the assets on debts of an inferior grade unless he have notice of the demands of a superior dignity.

We know of no law that requires the executor or administrator to delay the payment of any demand which may exist against the estate, for six months, or any other period of time, so as to afford an opportunity to any creditor to give notice of his demand. There is an act of the Legislature of this country, (1 Dig. L. K. 535,) which forbids any suit

Statute prohibiting an executor being sued for six months after probate, and forbidding him to confess a

POPE
vs.
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judgment within that time, so as to give one demand the preference over another, does not prohibit him from paying debts of the decedent within the six months, or change the law of such case.

Creditors of the decedent, to obtain the benefit of the dignity of their demands, must give the executor notice before payment of the inferior demands.

being brought against an executor or administrator until after the expiration of six months from their qualification as such; and the same act also forbids the executor or administrator within the same time, confessing any judgment, so as to give to any claim a superior dignity to any other claim against the estate of the testator or intestate. But neither of these provisions of the act are understood either to prohibit the executor or administrator from paying any of the creditors of the testator or intestate, or to impose upon him any additional obligation in case he should pay demands of an inferior degree, without notice of the existence of superior claims. As by the first provision in the act, none of the creditors are permitted to sue the executor or administrator within six months, it was not improper, by the latter provision, to preclude the executor or administrator from prejudicing the rights or interest of any, by his confessing judgment in favor of others. But in no other respect has the act imposed any restraint upon the creditors of the testator or intestate, or upon the executor or administrator.

The executor or administrator may now as they might have done before the passage of the act, proceed in the administration &c. by the payment of debts or otherwise, and the creditors are at liberty to make known their demands, so as to enable the executor or administrator to pay, or prepare for the payment of them in the due and regular order of administration; and if any creditor fails to do so, until after the assets are exhausted by the payment of others, whose claims are inferior, the loss is attributable to their own fault, and should not fall upon the executor or administrator.

The instruction ought not, therefore, to have been given to the jury.

The judgment must consequently be reversed with costs, the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

Denny for appellant; *Wickliffe* for appellee.

Boyd vs. Snelling.

ASSUMPSIT.

Error to the Bath Circuit; SILAS W. ROBBINS Judge.

Case 95.

Assignment of choses in action.

Judge OWSLEY delivered the opinion of the court.

June 21.

SNELLING sued Boyd and declared, in *indebitatus assumpsit*, for one hundred and twenty dollars, had and received by Boyd to the use of Snelling, and for the like sum paid, laid out, and expended, by Snelling, to and for the use and benefit of Boyd, at his special instance and request.

Indebitatus assumpsit for money received by defendant for plaintiff.

The trial was had on the general issue, and after the evidence introduced by Snelling was through, the counsel of Boyd moved the court to instruct the jury as in case of a non-suit. But the motion was overruled, and verdict and judgment recovered by Snelling.

Motion for non-suit overruled.

The facts which the evidence conduced to prove, are substantially these: The heirs of Cornelius Vanarsdale, for two of whom Boyd was guardian, had a claim against the executors of their deceased father's estate, for their distributive shares of the estate, and for the purpose of recovering the amount of their claim, Boyd, acting for the heirs, employed counsel, and caused to be commenced in their names, a suit in equity, against the executors. After the suit was brought, Snelling obtained from Abraham Vanarsdale, who was one of the heirs, the following writing:

Evidence of plaintiff given on the trial.

Whereas, I have a debt on Elisha Linville, dec'd, (one of the executors of the estate of Cornelius Vanarsdale, dec'd,) the same not ascertained, I do assign over all my right and title to my interest in that debt, to Benjamin Snelling, for value received of him; as witness my hand and seal.

Abraham Vanarsdale.

This assignment was made known to Boyd by Snelling, before the suit was terminated. The suit was afterwards settled by Boyd and the defendants thereto, and the amount agreed on by the parties received by Boyd, and the suit dismissed. The proportion of Abraham Vanarsdale's interest in the sum

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SNELLING.

received, was one hundred and three dollars, and the same was thereafter paid over to Abraham Vanarsdale by Boyd.

Assignment of a demand in a suit does not vest the assignee with such legal right as to enable him to maintain an action at law against the agent of the plaintiff, who, having conducted the suit, settled the controversy, and received the money, after notice of the assignment.

It was to recover the amount of that interest, to which Snelling conceived himself entitled, and which he supposed Boyd should not have paid to Abraham Vanarsdale, after having notice of his assignment, Snelling brought this suit against Boyd, and it was after the foregoing facts were proved, the court refused to instruct the jury to find as in case of a non-suit.

The instruction ought, we think, to have been given to the jury. There is nothing in the evidence which can upon any fair construction, be understood to establish in Snelling any *legal* interest in the money claimed by him, without which, according to the well settled doctrine of the law, no action at law can be maintained, whether the action be founded on a contract express or implied, or by parol, or under seal: 1 Chitty's Plead. 3, and the authorities there cited. By adverting to the evidence, it will be seen, that there is not the slightest circumstance, from which any thing like an express promise to pay the money, or any part thereof, to Snelling, was ever made by Boyd; so that, if Snelling has any legal interest, he must have derived it through the assignment to him by Abraham Vanarsdale, and the after receipt of the money by Boyd. But it should be recollected, that, at the time the assignment was made to Snelling by Vanarsdale, the latter held nothing but a chose in action, which is not assignable at law, and of course he could not, by any possible assignment, transfer any legal interest to the former; and if no legal interest passed by the assignment, it is not perceived how such an interest can have accrued to Snelling, upon the after receipt of the money by Boyd. The receipt of the money by Boyd, conferred upon Snelling no better right to it than he was entitled to whilst it was owing by the executors; and as he cannot, at most, have acquired but an equity by the assignment from Vanarsdale, his interest since the receipt of the money by Boyd, must be of the same sort, and therefore not recoverable by action at law.

The instruction ought, consequently, to have been given to the jury.

BOYD
vs.
SNELLING.

The judgment must be reversed, with cost; the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

Monroe for plaintiff; *Triplett* for defendant.

Woodson vs. Buford.

EJECTMENT.

Error to the Lincoln Circuit; JOHN L. BRIDGES Judge.

Case 96.

Evidence. Land warrants. Patents.

Judge MILLS delivered the opinion of the court.

June 21.

THIS is an action of ejectment, and a verdict and judgment was rendered for the plaintiff below.

On the trial, the lessor of the plaintiff gave in evidence a patent to himself, dated in 1801, issued by the state of Kentucky, and embracing the land in possession of the defendant. Evidence.

The defendant gave in evidence another patent for the same quantity, issued by the State of Virginia to the lessor of the plaintiff, dated in 1788, embracing in part the same land covered by the patent given in evidence by the plaintiff, but leaving out that part which was in possession of the defendant. The number of the warrant is recited in both patents, and is precisely the same in both.

The defendant moved the court to instruct the jury that if they believed from any evidence before them, that the patent in the name of the lessor of the plaintiff, read in evidence by the defendant, was founded upon the same warrant for 1000 acres of land, on which the patent read by the plaintiff was founded, and no other, that the warrant was merged in the elder patent, and that the patent read by the plaintiff to the jury, founded on the same warrant, was void and no recovery could be had thereon. This instruction the court refused, and the defendant excepted; and verdict and judgment having Instructions,

WOODSON
vs.
BURFORD.

Identity of the number of the warrant mentioned in plaintiff's patent and that recited in an elder patent, produced by the defendant for the same quantity of other land, is not evidence that there had been two grants on the same warrants, and for its entire amount.

Query of the effect of such fact, if proved by competent evidence.

been rendered against him, he has brought the case to this court.

If it be conceded that the defendant could impeach the grant of the plaintiff, by shewing facts without the face of it, (which is very problematical,) we conceive the court did not err in refusing the instruction asked, because the evidence on which it was asked was wholly insufficient to form a base for the instruction. It scarcely raised a suspicion, that, the lessor of the plaintiff had surveyed his warrant twice, and procured another patent on the second survey, securing to him additional land.

The presumption could not be indulged, that the officers of government would twice survey and patent the same warrant; but the contrary is the fair inference. The two surveys interfere, but for any thing that appears, there were as many entries as surveys, or there was as much land included in one entry as would satisfy both grants. To counteract all these presumptions, there was nothing offered by the defendant, but the simple identity of the number of the warrant, in each patent. If it follows from thence, that both patents are founded on the same warrant how much that warrant contains does not appear. It is not produced. It may contain a quantity equal to, and exceeding the sum of both grants, and the presumption is fair, that such is the fact. If the defendant had showed the warrant, and that it contained 1000 acres only, that there was one entry thereon for the same quantity, and that there were two surveys and patents on the same entry and warrant, each to the amount of the whole entry and warrant, then he would have been in a situation to make the question he has raised. But on the identity of warrant alone, his evidence was insufficient to require an instruction in his favor by the court. There is therefore no error; and judgment is affirmed, with costs.

Crittenden for plaintiff; *Haggin* and *Loughborough* for defendants.

South's and Hoy's heirs vs. Carr.

CHANCERY.

Error to the Fayette Circuit; JESSE BLEDSOE, Judge.

Case 97.

Process. Non compos mentis. Orders of publication. Executors. Heirs. Decrees.

Judge MILLS delivered the Opinion of the Court.

June 21.

THIS is a bill of revivor, to revive proceedings, and obtain a decree, according to the principles laid down and decreed by this court, in the case of Carr vs. Callaghan, 3 Litt. Rep. 365, this being a bill to revive the same suit. The revivor was had and the decree pronounced by default against the personal representatives as well as heirs of William Hoy and John South dec'd. there having been no answer filed by any of the defendants, except by infants and two adults.

Case stated.

The decree cannot be supported, and that for the following reasons:

There is a writing on the subpoena, purporting to be an acknowledgment of the defendants, Moses Davidson and Aaron Rogers, but no proof that it is genuine.

Proof of the endorsement of the acknowledgment of the service of a subpoena in chancery, must appear in the record.

There is no service of process on Theodosia Flournoy, one of the heirs of Hoy.

There is no answer for the lunatics or insane defendants, of which there are two in the cause, or any steps defending them by committee, either general or special.

Parties non compos mentis.

There is a special guardian appointed to answer for the infant children of Kezia Brown, who answers accordingly. But for how many of said children he appears, or how many are infants we are not told. It is not pretended in the bill that they are all infants, and they are ten in number, and no process was ever executed on any of them.

Infant defendants in chancery.

There is an order of publication against William Hoy, Jones Hoy, and Rowland H. South, and a certificate that it was inserted; but by whom that certificate was given, whether by the editor or by a stranger does not appear. Nor does it appear by the certificate that the order was inserted for any two months intervening between the making of the order and the day of appearance.

Orders of publication.

**SOUTH'S AND
HOY'S ESTATE
vs.
SNELLING.**

Where the executor denies assets, and there is no proof, the decree cannot be for the assets in his hands, but *quando acciderint*.

If in such case assets be proved to some amount, but not sufficient to satisfy the demand, the decree ought to order the payment out of the assets in hand for that amount, and *quando* for the residue.

As the decree is to be reversed for these errors, and the cause must be remanded for new proceedings, we cannot help remarking an impropriety in drafting the decree, which could pay no compliment to the draftsman. Tunstal, the executor of Hoy, denied the existence of assets, and yet the decree is rendered against the assets, "in, or which may come, to his hand." He ought not, without proof of assets, to have been subjected to a decree for assets in his hands.

And if there had been proof of assets, the decree ought to have carefully discriminated between those which were in his hands, and those which should yet come to his hands, directing the payment of the whole positively, out of the assets in his hands, if there were enough to satisfy the decree. If there were some, but not enough, then the payment as to so much as was in his hands, ought to have been directed positively, of the assets, which were of the decedant at the time of his death, and which had come to his hands to be administered, and as to the residue, out of the assets which belonged to the decedant at his death, and which should thereafter come to his hands to be administered. In like manner, Mrs. South, as the administratrix of John South, made no answer. The decree as to her, by her default, ought to have directed the payment out of the assets which were of the decedant at his death, and which had come to her hands to be administered. But in no case, could it be proper to render the decree, against these personal representatives, to be paid out of the assets which were in, and also which should thereafter come to the hands, of such representative to be administered. In this respect, the decree of the chancellor ought to pursue, generally, the course of judgments in a court of law. If there be a default, it may be taken as a confession of assets, and the decree ought to be rendered in such language, as explicitly to operate on the assets which were of the decedant at his death and which had come to the hands of the representative to be administered. If the want of assets is put in issue, the quantum existing is to be tried. If found for the administrator or executor then the decree is to

be rendered wholly *de bonis quando acciderint*. If there be enough on hands to satisfy only part of the demand, then such part is to be levied of the estate already on hand, and the residue *de bonis quando acciderint*. But that any part, or the whole, should be rendered, either of one or both kinds of assets, is a novelty in legal proceedings.

SOUTH'S AND
HOY'S h's
vs.
CARR.

It is still more ludicrous to observe in this decree against the heirs, that it has been supposed that the heir could take assets, as the administrator does, at different times. Hence the decree is so expressed as to reach not only the assets descended, but those which should thereafter descend, providing for a future supposed descent; an event which could never happen.

There can be no decree against heirs *quando*; for there cannot be a future descent of assets to them.

The decree is reversed, with costs; and the cause remanded for new proceedings, not inconsistent with this opinion, and the rules and usages of a court of equity.

Haggin for plaintiffs; *Wickliffe* for defendant.

Butt vs. Bondurant.

CHANCERY.

Appeal from the Montgomery Circuit; S. W. ROBBINS, Judge. Case 98.

Specific performance. Unequal and hard bargains. Extortion. Usury. Conditional sales. Bank notes. Commissioners. Mortgages. Practice.

Judge MILLS delivered the Opinion of the Court.

June 25.

BUTT being in need of money, applied to Bondurant for a loan, which was ultimately granted, on the following terms: Bondurant furnished one hundred and twenty-three dollars, in notes on the bank of the Commonwealth, then at a large discount, or rather \$120 in bank notes, and a private note of \$3 made between the parties. Butt paid back twenty dollars at the moment, as the interest on the loan, and as security, Bondurant took from Butt a conveyance of the tract of land on which he lived, expressing the consideration of \$123, describing the land only as the tract on which Butt resided, supposed to contain about 106 acres; but

Butt obtains a loan of Bondurant on terms held to be usurious.

Mortgage.

BUTT
vs.
BONDURANT.

Condition in
the deed of
mortgage,
and stipula-
tion for abso-
lute sale.

otherwise in usual form, with the following condition or defeasance annexed.

"Subject, nevertheless, to the following defeasance, or condition; that is to say, if the said Edmund Butt shall repay to the said Joseph Bondurant, the said sum of one hundred and twenty three dollars, in twelve months from this date, in *lawful money*, bearing interest at the rate of six per cent, per annum, then this conveyance is to become null and void, and the title is to re-vest in the said Edmund Butt. But if the said Edmund Butt shall fail to repay to the said Joseph Bondurant, the said sum of one hundred and twenty three dollars, in lawful money of Kentucky, in twelve months from the date, then if said Joseph Bondurant shall pay to said Edmund Butt so much current money as shall make the price of ten dollars for each acre of said land, including the said sum of one hundred and twenty three dollars, with six per cent. per annum, then the said Edmund Butt is to make an absolute deed in fee simple, to the said Joseph Bondurant, for the land, according to the above, with a clause of special warranty, against the said Edmond Butt, and all persons claiming under him; but not against any other person whatsoever: it being understood, that if said Butt should fail to repay to said Joseph Bondurant said one hundred and twenty three dollars, as described in the foregoing part of this article, then said Joseph Bondurant is to pay to said Butt according to the foregoing condition five hundred dollars in current money of Kentucky, on the first of January, 1823, at which time said Butt is to deliver possession of the said land to said Bondurant, and the balance on the first of January, 1824.

Default of
Butt. Subse-
quent tender.
Bondurant's
refusal of the
money, claim
of his pur-
chase, and
tender on his
part, and

But failed to repay the money, or the \$123, with its interest, at the day above stipulated; but a few days afterwards, offered to do so. But Bondurant then refused to accept it, and claimed the purchase of the land; and on the first of January following, tendered \$500 in paper of the Bank of the Commonwealth, to Butt, (which paper Bondurant alleges was the currency intended by the writing) and demanded the possession. Butt refused to receive the

money tendered and brought this bill to redeem the land, relying on the usury and other circumstances.

BUTT
vs.
BONDURANT.

Bondurant answered, relying on the writing as constituting a conditional sale, and his election under it, and fulfilment thereof, and makes his answer a cross-bill, and prays a specific performance of the contract for the conditional sale.

Butt's bill to redeem.

Bondurant's answer.

The court below dismissed the bill of Butt, and decreed a specific performance in favor of Bondurant, from which decree Butt has appealed.

Decree of the circuit court.

We perceive insuperable objections to a specific performance in favor of Bondurant. Butt seems, first, to have had his election to repay. If he failed, then Bondurant had his election to make this a purchase of the land or not, at his pleasure; and if he did not do so, we know of no remedy in favor of Butt, which could have compelled Bondurant to make his election. The contract, therefore, was not mutual, and generally, equity will not specifically enforce a contract where the remedy would not be mutual; but will leave the party to his remedy at law.

In general, equity will not enforce a contract where the remedy is not mutual.

Again, the contract, to say the least of it, was one obtained under circumstances of hardship, and favors of extortion. For if Bondurant's account of it is true, that the price of the land was to be paid in commonwealth's paper, after deducting the first loan, with interest, legal and illegal, he would obtain the land for about half its value; which circumstance would cause a court of equity to refuse its aid.

Equity will not favor extortion and enforce hard bargains.

But what is still more conclusive, is this, the transaction was usurious. Butt was to repay the first loan at a rate of about 26 per centum per annum, thereon, or he was to deduct the loan, with the same interest out of the price of the land. If such a contract could be permitted to stand, the statute against usury would be a dead letter. It would only be necessary to follow the loan with a conditional sale of property at half price, and whether the borrower restored the money or paid for it in the estate bought, he would still have to pay usury,

Device of conditional sale of the mortgaged property, to the lender to cover the usury, ineffectual.

BUTT
vs.
BONDURANT.

Value of the bank paper loaned, to be ascertained by a com'r, usury extracted, and mortgagor allowed to redeem, or sale ordered.

and endure oppression, which is the very evil the law intended to avoid.

It follows, therefore, that Butt has an unquestionable right to redeem, on repaying to Bondurant, the value of \$103, in paper on the Bank of the Commonwealth, at the date of this loan, with legal interest thereon from that period till the sum is paid. As the law stood at the date of this transaction, and as it still is, an usurious contract like this, is not utterly void; but is only void as to the usury, or the excess beyond legal interest. The writing, therefore, which Bondurant holds on the land, will operate as a lien in his favor, to secure the real amount loaned, with its interest. The court below ought, therefore, to ascertain the value of the \$103 in bank paper when loaned, and as the parties are not agreed in their pleadings touching this value, the court can ascertain it by a reference to a commissioner or commissioners, and then to calculate the legal interest thereon, and appoint a day in court for the payment of the amount by Butt, after deducting costs, and if the payment is not made in the time allowed, then the court may direct a sale of the land, or so much thereof as will be sufficient, to satisfy the demand of Bondurant, thus ascertained to be due.

The decree is therefore reversed with cost, and the cause remanded, for such decree and proceedings to be had, as shall not be inconsistent with this opinion.

Hanson for appellant; *Triplett* for appellee.

CHANCERY.

Bouldin vs. Alexander.

Case 99

Appeal from the Trigg Circuit; BENJ. SHACKELFORD, Judge.

Injunctions. Jurisdiction. Replevin. Execution.

June 26.

Judge MILLS delivered the Opinion of the Court.

Bill to enjoin the sale of two boats and their cargoes, seized

THIS is a bill in equity, enjoining an execution from selling, through the hands of the sheriff, two flat bottom boats, lying at Boyd's landing on Cumberland river. At the time of the seizure of these boats, Alexander, the complainant, be-

low was in the act of lading, for a voyage down the Mississippi, and his crew was hired, and engaged with him. They were taken by the sheriff, as the estate of David S. Campbell, by an execution in favor of Bouldin. Alexander alleges the boats are his, and not the property of Campbell, and prays that his title may be quieted.

**BOULDIN
VS.
ALEXANDER.**

under an execution against another person.

The claim was resisted by Bouldin, and the right of Alexander contested. But it was sustained by a decree of the court below, and a perpetual injunction granted.

Decree of the circuit court for the complainant.

It has been so often held by this court that a claim of this character is of a legal nature, and that the party asserting it must do it in a court of law, that to depart from the rule now, could admit of no apology. The cases reported are numerous, and to cite them would be a vain parade of authority, and moreover, many cases have gone off without being reported, because the law was considered as settled. As late however, as the case of *Watkins vs. Logan, Davis &c.* 3 Mon. 20, a written opinion, was delivered, sustaining the same principles.

Remedy of the owner of property seized under an execution against another, is at law, not in equity.

It must, however, be admitted, that the rule is general, and not universal, and that there will be found exceptions to it. If cases can be found where there is no legal remedy, or where the legal remedy would be inadequate, or where there was some potent obstruction to the legal remedy, they may be exceptions; and as the chancellor in like cases, is permitted to intrude himself into the precincts of a court of law, and operate on legal questions, so he may in this instance. On this ground it is contended that this bill ought to be sustained; that this case is peculiar and forms a just exception to the general rule. It is insisted, that neither trespass, trover, nor detinue, after the estate was sold, could have remunerated Alexander for the loss of his trip, and that no remedy would have been adequate which would not have restored to him the immediate possession of these boats.

Where in such case there is no adequate remedy at law, the chancellor may afford relief.

We grant that the immediate restoration of these boats was necessary to do justice to Alexander, and

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if there was no legal remedy, which could have given him such possession, we should be disposed to sustain his bill for that purpose, especially as his title to the boats appears to be well founded.

Action of replevin is not confined to cases of distress, but is the remedy for any wrongful taking the property of the owner out of his possession.

But there is such a remedy. And although it has fallen somewhat into disuse in this country, yet if practised, it would be found a convenient mode of trying, what many have attempted to try by bills in equity of this nature. We allude to the action of replevin. By that the thing replevied at the execution of the writ is returned to the plaintiff, and the subsequent proceedings, are calculated to try the right to the thing replevied. It has been said in some books, and particularly by justice Blackstone, in his commentaries, that replevin is a remedy founded on a distress; but as Lord Redesdale has well observed, in *Shannon vs. Shannon*, 1 Sch. and Lef. 325, "this definition is certainly too narrow; many antient authorities will be found in the books of replevin being brought where there was no distress. The writ of replevin is founded on a *taking*, and the right, which the party from whom the goods were taken, has, to have them restored to him, until the question of title to the goods is determined. The person who takes them, may claim property in them, and if he does, the sheriff cannot deliver the goods until that question is tried; but that claim of property can be made only where there has been a *taking*; and it appears to me (says the same author) that the writ of replevin is calculated in such cases to supply the place of detinue and trover, and to prevent the party from whom the goods are taken being put to those actions, except where the other can show property. Replevin must be applied to the case of an unequivocal possession and of a *taking*; it would otherwise not be reasonable; for if there has not been a *taking* from the plaintiff, but the defendant had the goods in his quiet possession by other means, the law presumes they are, *prima facie*, the property of the defendant; and there is no reason why it should, in such case, give a writ to change the possession in the first instance, against such presumption of property. It is much fairer to throw the *onus* on the person who has not had the

possession, than on him who has had it." Without referring particularly to the authors, it will be found, that this doctrine of Redesdale is in strict conformity to the antient law. It has likewise been followed in the American States; see *Pangburn vs. Partridge*, 7 John. 140; 1 Dall. 157; 2 Dall. 54. Actions of replevin have also passed through this court, applied to other cases than mere distress, where the applicability of the remedy to such other cases has not been questioned; *Kirley vs. Hume*, &c. 3 Mon. 182.

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It may, however, be said, that property or estate taken under execution, cannot be replevied. This, as a general principle, is laid down in all the books that treat of the action of replevin; and we have no doubt, that the defendant in an execution cannot try the validity of an execution by issuing a writ of replevin, or thus relieve his estate from the grasp of the law. But the rule, as laid down, was never designed to take away the right of strangers to an execution, relieving their estate when taken by it. As to them, the taking by color of the execution against another, is so tortious, that trespass will lie, and the tort may be waived, and the writ of replevin be issued. To prevent the bringing such an action in the state of Pennsylvania, a statute was passed, particularly relieving the sheriff from the action; which shews, that the understanding of the law was in that state, that the action lay before the statute. And after the statute, it was held, that the action lay against the vendee of the sheriff; so that the sheriff alone was protected: *Shearick vs. Huber*, 6 Bin. 2. In the state of New-York, it has been clearly decided, that although the defendant in an execution could not himself maintain the action, yet it might be brought by a third person, even against the sheriff, and consequently against the plaintiff when the sheriff, as is alleged in this case, acted under his special authority; *Thompson vs. Button*, 14 John. 84: so that, according to good authority, the action of replevin will lie, in a case like the present.

Defendant in the execution by which the property was seized, cannot regain the possession by the writ of replevin; otherwise of strangers to the process.

It is true that if the plaintiff in replevin is defeated, he is subject to a judgment *de retorno habendo*,

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which admits of severe process when the goods are eloiigned; and it may be urged, that taking these boats down the river would have rendered it impossible ever to have restored them, because they are not constructed to come up the stream, and that therefore he ought not to be subjected to such judgment, by being driven to such action. This supposes that he was not entitled to the estate, and yet ought to be permitted to issue the writ; when, if he was entitled to the estate, he never would be subject to such judgment, and if he was not entitled to the estate, he ought to be subject, and therefore the argument can have no weight, as it only operates in favor of him who issues the writ wrongfully. The chancellor, if the equitable remedy could be allowed, would require a bond to restore; and if the complaint was groundless ought generally to direct the restoration of the estate; so that a claimant making a wrong application to either court would be subjected to a like bond with surety, and might be subjected to a like sentence. Upon the whole, we conceive that the complainant in this case had adequate redress at law by action of replevin, and that his case cannot be made an exception to the general rule.

Judgment in
case the pl^{ff}
fail to re-
plevin.

Decree, Chief Justice dissenting, reversed, with costs; and cause remanded, with directions to dissolve the injunction, and dismiss the bill with costs.

Dissent of Chief Justice BIBE.

BOULDIN sued his execution, bearing teste on the 28th Feb. 1825, against the estate of David S. Campbell, and caused it to be levied on two boats, lying at Boyds landing, on the Cumberland river, whilst Alexander was in the act of loading them with tobacco, to be freighted to New Orleans. One of these boats, built for Alexander by Wells and Brown, by special contract, had been delivered accordingly; the other he purchased of Josiah Barnett. Alexander exhibited his bill, setting forth, the special circumstances, his property, and possession of those boats before the teste of the execution, and the seizure under color of the execution against Campbell; that he had hired his crews; had partly loaded

his boats; that if deprived of them, or detained until after the sale advertised by the sheriff, his expenses of himself and crews would eat up the profits of the voyage, and perhaps the exportation of the tobacco would be totally broken up; that no damages which he could recover at law would compensate him for the detention, if not speedily restored to the possession of his boats. He prayed for and obtained restoration of his boats, and an injunction against further molestation, upon giving bond with security to pay all damages which Bouldin might sustain, in case his injunction should be dissolved.

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Bouldin answered, that he believed the boats to be the property of Campbell, and built by him, and liable to the levy made.

On hearing the court perpetuated the injunction, adjudging the boats to be the property of Alexander, and not subject to the levy complained of. From this decree Bouldin appealed.

There is some colour of evidence that Campbell had assisted to build one of the boats; but whatever act or part he may have had in building the one or the other, the facts are clear, that Alexander was the *bona fide* possessor by purchase and delivery, made before the teste of the execution.

The only question is, as to the propriety of the remedy by bill in equity.

From the construction of these, and all such like boats, they are calculated only for descending, not for upward navigation. When descended to the lowest point to which they can be navigated, their capacities and utility, as boats, cease; they are treated as wastes. Their value intrinsically is small, their utility consists in their capacities to perform a single voyage, in transporting productions of the upper to the markets in the lower country, thereby giving to the owner, if the voyage is finished, profits upon a single adventure of his money, labour, care, and diligence, in the preparation of the boats, employment of crews, and risk of navigation.

The intrinsic value of the boats, if recovered in

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an action of trespass; would have been very far short of adequate redress to Alexander, for the act of seizing and selling his boats; detention and hindrance from the voyage and exportation of the tobacco would have been the utmost aggravation of the injury to him. But the expected profits of a contemplated voyage, if prosperous and finished, could not have been recovered of the sheriff, or of Bouldin, for an unlawful seizure and sale. Such consequential damages are too remote and speculative, to be recovered in an action of trespass. In marine trespasses the consequential damages are more intimately connected with the tort; less remote and more certainly to be calculated, than in such trespasses as this bill brings to the consideration of the court. Yet in marine trespasses the probable profits of an unfinished voyage, afford no rule for estimating the damages, and such items are to be rejected; as decided by the Supreme Court of the United States, in the cases of the *Amiable Nancy*, 3. Wheat. 546; *La Armistad de rues*, 5. Wheat. 384. The diminution in value by reason of the injury, with the interest on the valuation, afford the true measure of estimating the damages in cases of marine trespass. (*The Amiable Nancy*, 3. Wheat. 546.)

There were damages, therefore, which the complainant, must have sustained, if he had been deprived of his boats, which could not have been recovered in an action of trespass. It was essential to the complete redress of Alexander, that he should have been speedily restored to the possession of his boats; with liberty to make full and unrestrained use of them for the intended voyage.

By the opinion formed by a majority of the court, the remedy by bill in equity is denied in this, as well as in cases generally, of tortious seizure and detention of property; because a writ of replevin would lie. Whether such a writ will lie against a sheriff, to cause him to re-deliver goods and chattels taken in execution by virtue of a *feri facias*, or by other colourable execution of the duties of his office, I give no opinion; because if such writ would lie, that does not prove to my mind, that the remedy by bill in equity should be denied. A man may have an elec-

tion of several remedies for the same injury: as, in this case, the complainant had his election to have tresspass, trover, or detinue. But because these remedies were within his election, it does not thence follow that replevin would not lie; nor does it follow, necessarily that a bill in equity will not be sustained, because a writ of replevin may be sued. So one may elect to sue an action of covenant for breach of an agreement, or to bring his bill in equity for specific performance; to which many other examples might be added, of concurrent jurisdiction of courts of law and courts of equity.

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That a writ of replevin will lie against the sheriff, by one not party to the execution, to have redelivery of the goods taken in execution, has been decided in the Supreme Court of New York. While I acknowledge my very high respect for that tribunal, I must own, that my mind hesitates much to assent to the conclusion, that any one shall, of his mere will, without the permission of a judge, but as matter of right, arrest the property from the sheriff or other officer, and so stop, delay, and hinder the execution of the process. If it will lie in case of goods seized under execution, it will lie for goods seized for non-payment of the revenue, &c. &c. It may be so; I mean not to express any decided opinion on that subject, because I deem it unnecessary, as weighing but little upon the present question. The condition of the bond upon suing a writ of replevin, and the condition of an injunction bond, are very different. The consequences of a judgment *de retorno habendo*, in case Alexander had sued a writ of replevin, to his surety, and to himself, would have been very different from the effect of the injunction bond in case of dissolution of the injunction. To have kept the boats within the state, to answer a possible judgment *de retorno habendo*, would have defeated the very end and profit for which Alexander bought the boats. By taking them to N. Orleans, he put it out of his power to return them. To this, however, it is answered, that if the property was really Alexander's he was in no danger of judgment *de retorno habendo*; and if the boats were not his, he ought not to sue a writ of replevin. To this

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I reply, that the law is more certain in abstract theory, than in the practical administration; fact and law combined enter into the decision of the question between the parties litigant; from casualty, of death, non attendance or forgetfulness, of witnesses or other causes, the fact may not appear on the trial; the judge may differ in his opinion of the law from the party or his counsel, or may mistake the law. As Lord Mansfield said, in deciding a case for a wager upon a point of law, it would be very hard upon the gentlemen of the profession, if the law should ever come to be so certain, as that such a wager should be held unfair because one of the betters had no chance to win. In fact and experience, it is known, that the race is not always to the swift, nor the battle to the strong. The art and cunning of an adversary may prevail over fact and truth. In framing rules for the administration of justice, they should be reasonable and practical; they should not be such as will deter men from seeking their rights, nor lay them under such severe requisitions and penalties in prosecuting their reasonable and apparent claims, as that they can not find the necessary security, or be subjected to the mere power and arbitrary will of the adversary, in case of failure. If Alexander, had sued a writ of replevin, and after, carried the boats to New Orleans, the sheriff, upon a writ *de retorno habendo*, must have returned, that the boats were *eloigned—elongata*. Is it a reasonable rule, to prescribe to Alexander, to regain his property, that he should give bond and security to return the boats in case he fails in his action, when by so doing, and using his boats in the only way that they were fit for use, he incurred a risk of subjecting himself to the power of his adversary in a writ of *distress infinite*? The remedy by bill in equity is preferable; because the injunction is obtained by application to the sound discretion of the judge, grounded on a statement of the right, verified by affidavit; the writ of replevin issues at the mere will of the plaintiff; the injunction bond is moulded by the chancellor, to suit the nature of the case; the bond in replevin is for the return of the property; the remedy in equity is under the control and authority of

the court, to make such orders from time to time as the facts and exigencies may require, and is therefore more in subserviency to the purposes and ends of justice. If Alexander had sued a writ of replevin to get back his boats, his removing them beyond the jurisdiction of the court, and beyond the possibility of return, would have been in violation of that which the law intends by allowing the writ and requiring bond and security to have a return of the property, if so awarded by the court. Full many an innocent man has been condemned, and many a guilty man has escaped; “—not always on the guilty head descends the fated flash.” I do not think therefore, that Alexander was bound to incur the risk of a judgment *de retorno habendo*, with all the consequences attendant upon a return of *elongata*, however confident in his own mind, that the boats were not liable to the execution. I think it belongs to the jurisdiction of a court of equity to assure to the right owner the specific thing, when wrongfully dispossessed by colour of the precepts of the law.

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There are cases in this court which deny the jurisdiction of a court of chancery; there are cases also which affirm the jurisdiction. The cases reported, which were discussed, and denied the jurisdiction, are Nesmieth vs. Bowler, 3 Bibb, 487, Kendrick vs. Arnold, 4 Bibb, 236; and Watkins vs. Logan &c. 3 Mon. 20; other cases have also been decided upon the authority of those, as, Meridith vs. Hickman, 1 Marsh. 242; Wickliffe and McKinley vs. Hickman, same book, and perhaps several others have been decided in this court *sub silentio*, upon the authority of Nesmieth vs. Bowler and Kendrick vs. Arnold. I recollect but one other case, and that went off because judge Owsley thought the court had no jurisdiction, and I was of opinion the court had jurisdiction, but that the complainant's claim was fraudulent. Opposed to those decisions, and in affirmation of the jurisdiction, are the cases of Meaux vs. Haggin, 2 Bibb, 244; McGinty's adm'r. vs. Haggin, 2 Bibb, 267; Randolph vs. Randolph, 3 Munf. 99; Wilson vs Trent and Butler, 3 Munf. 564; Osburn vs. Bank U. S. 9 Wheat. 845.

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In McGinty's adm'r. vs. Haggin, the question of jurisdiction is examined, and affirmed on the ground that, "one of the great ends of equity is to aid the common law, in cases in which its protection and redress are inadequate to the common purposes of justice." The court further said: "But it appears in the cause, that the executions were levied on slaves. Now when we consider how often the common law redress of remunerating in damages the loss of slaves thus seized and sold, would poorly compensate the owner it is conceived, as forming a just case for the interposition of chancery, to enjoin the sale at law. The case of Meaux vs. Haggin &c. decided by this court at last term, was, in principle, just such a case, except that the court in that case thought the slaves, subject to the debt. But the question of jurisdiction was properly not controverted."

In consequence of the notice of the case of McGinty's adm'r. vs. Haggin, taken in Watkins vs. Logan &c. with a view to shake the authority of that case, upon this question of jurisdiction, I have again looked into the opinion last delivered, in McGinty's adm'r. vs. Haggin. The petition for a rehearing objected to the jurisdiction of a court of equity; it suggested, that the complainant, (the administratrix) ought to have set forth what assets came to her hands, before she should be relieved upon her bill claiming the slave in her own right, and that the court had mistaken the fact as to complainant's right of property. The answer had denied that the slave was the property of the complainant in her own right, and the evidence did not prove the slave levied on to be the one alluded to in the writing by which she claimed. The question of jurisdiction was certainly preliminary in its character; and if the appellate court had supposed that the case was not a proper subject of equitable jurisdiction, then the bill should have been dismissed for that cause, leaving the complainant to pursue her claim in a court competent to hear and decide upon it. So far from dismissing the bill for defects of jurisdiction, the court said: On a re-examination, two questions have principally attracted the attention of the court, "the first is, the failure of

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the complainant to set forth the amount of assets, or an equivocal denial of any; 2nd. whether the property executed, belonged to the administratrix in her own right. On both these grounds the court, on a more thorough examination of the case, is of opinion that the former opinion of this court cannot be maintained." On the first point, the court enter into the reasoning, to show why she ought to have set forth the assets, so that they might have been applied to the execution which issued against her as administratrix; that as complainant seeking equity, she ought to do equity; and that by the omission to state the assets, the defendants were liable to repeated vexation; and conclude this first point by saying, "we cannot sustain the bill for this omission or failure on the part of the complainants." Does this savour of a want of jurisdiction? On the second point, the court decided the fact against the complainant. She had not shown that the property levied on was the part assigned to her; so as not to be liable to the execution against her as administratrix. Thus her claim was concluded by the decision. Comparing the two opinions, with a view to this question of jurisdiction, I feel fully warranted in saying, the last opinion is a confirmation of the first upon this question, and has all the force of a decision in favor of the jurisdiction decided, reconsidered, and approved. Will it be said, that in the last opinion, the judges of this court did not understand the difference of effect, between turning the case upon the question of jurisdiction, and deciding it on the merits, or that they did not understand their duty to decide the case on defect of jurisdiction, if such was their opinion.

In *Wilson and Trent vs. Butler and others*, (3 Munf. 564,) the court of Appeals of Virginia, upon this question of jurisdiction, delivered their opinion in these words: "The court is of opinion, that although a party whose property is taken in execution to satisfy the debt of another, may proceed to recover that property, or damages for the taking and detaining thereof, in a court of law; and although it is competent to the sheriff, having doubts as to the title of the property taken in execution, to

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demand from the creditor an indemnifying bond, pursuant to the act in such case made and provided, yet neither of these remedies are in exclusion of a proceeding in equity, having for its object the retention of the property in specie. Every agreement on which the jurisdiction of the courts of equity, to compel a performance of a contract in specie, is founded, is supposed to hold with equal force at least, in favour of retaining a subject of property, which another having no title thereto, claims to arrest and dispose of by means of an execution, rather than turn the rightful owner round to seek an uncertain and inadequate reparation in damages. On this ground, the court is of opinion, that the declared principle of the decree before us is erroneous."

In *Osburn vs. the Bank of the United States* (9 Wheat. 845,) the supreme court of the United States, sustained the jurisdiction of a court of equity to restore the money and notes which had been taken (wrongfully, as that court said,) under a distress for non-payment of the tax levied on the Bank. Without meaning to assent to the opinions expressed upon the other questions involved in that case, I am fully satisfied, that the question of the general jurisdiction of courts of equity to assure to the right owner his property against a wrongful taking under colour of law, was there properly settled. The principle upon which the jurisdiction is placed in that decision, is, "that a court of equity will always interpose, to prevent the transfer of a specific article, which, if transferred, will be lost to the owner. Thus the holder of negotiable securities, indorsed in the usual manner, if he has acquired them fraudulently, will be enjoined from negotiating them; because, if negotiated, the maker or indorser must pay them. Thus, too, a transfer of stock will be restrained in favor of a person having the real property in the article. In these cases the injured party would have his remedy at law; and the probability that this remedy would be adequate, is stronger in the cases put in the books, than in this, where the sum is so greatly beyond the capacity of an ordinary agent to pay. But it is the province of

a court of equity in such cases to arrest the injury, and prevent the wrong. The remedy is more beneficial and complete, than the law can give."

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The injunction against committing waste, is founded on the same principle of assuring to the right owner the specific property: damages might be recovered for the waste, but will not restore the thing. This bill is not a suit to have satisfaction for a trespass; but a suit for the specific thing; to have the very thing wrongfully taken; there are no damages asked for the trespass, that is waived as in detinue. The bill, in all such wrongful seizures by the sheriff, is for specific execution of the right of the complainant to have the thing, and to be protected in the use and enjoyment of his right. Fortified, as I am, by the former decisions of this court, and by the concurrent opinions of so many learned and able jurists, I cannot consent to destroy so useful a branch of the jurisdiction of courts of equity, one so important to the security of property. The idea that an action of detinue, trover, or trespass, gives adequate redress for loss of property wrongfully taken, is abandoned. The sense of every man tells him that a future recovery after delays incident to a suit at law, is not an adequate redress for the privation and injury sustained by wrongful abduction of property. Yet this redress by trespass, trover, or detinue, is the cause assigned in *Kendrick vs. Arnold*, and in *Nesmieth vs. Bowler*. The case of *Watkins vs. Logan* rests upon those former decisions. Now, the writ of replevin is assigned as the cause for denying the remedy by bill in equity. If the writ of replevin will lie, yet it is but little understood, and less used in this community, it is not exclusive of the remedy by bill in equity. The remedy by bill is more simple and less liable to mistake or abuse.

My opinion is, that the decree of the circuit court be affirmed; but by the opinion of the other judges of the court, it is to be reversed for want of jurisdiction.

Triplett for appellant; *Mayer* for appellee.

CHANCERY.

Talbot vs. Cook and Carrington.

Case 100.

Error to the Nicholas Circuit; WILLIAM O. BROWN, Judge.

Assignees of choses in action.

June 27.

Chief Justice BIBB delivered the Opinion of the Court.

Allegations
of Talbot's
bill.

CARRINGTON being indebted to Talbot and Baylor, merchants and partners, (of whom Talbot is the survivor,) left with their clerk, Walton, a note on Redman for collection, to be applied towards the payment of Carrington's debt. Walton gave a receipt for the note, but did not specify the use to which the money was to be applied, if collected. Cook, in the name of Carrington, obtained a judgment against Talbot for the money collected of Redman. Talbot exhibited his bill for relief against Carrington and Cook, setting forth the circumstances, that the note was left for collection with their clerk, Walton; that Walton receipted for the note in the name of Talbot only, and not in the name of the firm; that the partnership had been dissolved, and that by the terms of dissolution, Talbot became the owner of all the credits of the firm. The bill alleged, that Cook never had any assignment of the receipt, nor even the receipt itself; but if he ever had it, he obtained the receipt by fraud and collusion, and was indebted to Carrington, and that Cook prosecuted the suit in the name of Carrington, who was out of the country; that if Cook had any interest in the note of Redman to Carrington, he acquired it long after the note was left with the clerk of said Talbot and Baylor. The bill was taken for confessed, as to Carrington.

Cook's answer.

Cook alleges he had the receipt and an order from Carrington on Talbot for the money, when collected of Redman, both of which are lost.

Decree of the
circuit court.

On final hearing, the bill of Talbot was dismissed, his injunction was dissolved, and he was decreed to pay ten per cent damages to Cook.

Evidence.

The case as between Carrington and Talbot, is clear; as well by the written exhibit, A, signed by Carrington, as by the deposition of Monson. It appears that the note on Redman was left with Tal-

bot for the purpose of satisfying Carrington's debt TALBOT
to him, when collected. vs.
Cook &c.

As to Cook, he is, according to his own statement, only the equitable holder of the receipt, with an order on Talbot for the money; his equity is long posterior to Talbot's equity; for Talbot's equity commenced when the note was left with his clerk for collection, to be applied to Carrington's debt to Talbot. Cook's commenced after Carrington had left the country, and by an order on Talbot, with whom the note of Redman had been left. Talbot never accepted that order. The proof which the parties have run into for the purpose of shewing how Cook obtained the order and receipt from Carrington, whether fairly or unfairly, or whether Cook was indebted to Carrington or not, is all useless. Talbot's equity is prior in time, and Cook, in prosecuting the suit in the name of Carrington was acting without authority.

Between assignees in equity of a chose in action, the prior assignee prevails.

It is ordered and decreed, that the decree of the circuit court, upon the bill of the complainant, Talbot, be reversed; and that the cause be remanded, with direction to enter a decree, perpetually enjoining proceedings on the judgment at law, and also decreeing that Cook pay the costs at law and in chancery. Decree.

Depew and Shepherd for plaintiff; *Triplett* for defendants.

Divine vs. Harvie.

CHANCERY

Appeal from the Franklin Circuit; HENRY DAVIDGE, Judge.

Case 101.

Constitutional law. Suits against government. Public creditors. Auditor and Treasurer. Choses in action. Mandamus. Statutes. Construction.

7m 439
f103 403
7m 439
f104 19
7m 439
106 719

Judge MILLS delivered the Opinion of the Court.

June 27.

Case stated

THE legislature of Kentucky, at their session of 1825, allowed to Roger Divine, \$252 50, for cutting and piling wood, for the house of representatives, during that session, and this allowance was made in the ordinary appropriation bill.

DIVINE
vs.
HARVIE.

John Harvie, who was a creditor of said Divine, by judgment and an execution of *feri facias* thereon, returned, "no property found," filed his bill in equity, to subject this claim of Divine against the State, to the satisfaction of his judgment under the act of assembly which authorizes a bill in equity to subject equitable estates and choses in action to the satisfaction of such judgments. He made said Divine, the Auditor and Treasurer of the State, parties, and prayed that the Auditor might be directed by the decree of the court to draw the warrant in his favor, and the Treasurer to pay it in satisfaction of so much of the judgment.

Demurrer to
the bill over-
ruled, and
decree for
Harvie.

There being no dispute about the facts of the cause, Divine submitted the case to the court on demurrer to the bill, for a final decree. The court below decreed in favor of the complainant and directed the Auditor to draw the warrant to Harvie, and the Treasurer to pay him the amount.

From this decree Divine has appealed.

Statute sub-
jecting choses
in action to
the payment
of debts.

The act of assembly, under which these proceedings were had, reads thus:

"Whenever an execution of *feri facias*, founded upon any judgment or decree, or upon any bond having the force of a judgment, shall issue to the proper officer, and be returned, as to the whole or any part thereof, in substance, that the defendant hath no effects in his bailiwick to satisfy the same, the proper court or courts of chancery shall have jurisdiction, on bill filed, to subject to the satisfaction of such judgment, decree or bond, any choses in action belonging to the debtor, and also any equitable or legal interest in any estate, real, personal or mixed, which the debtor may be entitled to; and to that end may bring other parties before the court, and make such decree as may be equitable under the jurisdiction hereby conferred."

The expressions of this statute are very broad, and it does subject to the power of the chancellor, the interest of the defendant of almost every character. It is now our part to consider whether it is broad enough to reach this demand of Divine a-

gainst the State and subject it to his debts; or whether this appropriation by the State is excluded in this provision.

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It seems to be conceded on all hands, that the State cannot be made a party defendant, and is not suable in her own courts.

State cannot
be sued in her
own courts.

Although the constitution has declared, that "The General Assembly shall direct by law in what manner and in what courts suits may be brought against the commonwealth," yet that body has never complied with this direction; but has hitherto kept in their own power the granting of justice to creditors of the State on petition. This voluntary grant of the State to individuals is the only judgment and execution to which the State is subject. Whatever, then, the claims of Divine may be against the State, and however clearly they may be acknowledged, the State cannot become a garnishee; and we cannot suppose that this act, granting jurisdiction to the chancellor, was intended to make the State suable.

There has
been no en-
actment, un-
der the
clause of the
constitution,
which directs
the legisla-
ture to pro-
vide how
suits shall be
brought a-
gainst the
state.

State cannot
be made a
garnishee.

Nor do we conceive that the Auditor and Treasurer are proper parties to the controversy; or that they can be used as a substitute for the State. They are not officers appointed to defend the interest of the State generally, although by special act of assembly they may be used as such. The attorney general has more claims to the general appointment, to defend the rights of the State.

Suit cannot
be maintain-
ed against
the auditor
and treasurer
as parties, in
place of the
state, to ob-
tain a war-
rant and mo-
ney from the
treasurer.

The only analogous case, in our recollection, which might be supposed to give color to the right of making the Auditor and Treasurer parties, when the State could not be sued, is that of *Osborn vs. United States Bank*, 9 Wheat. 738. But the analogy between the cases fails in an important particular. In that case, under an act of the general assembly of Ohio, the Auditor issued his warrant, to an officer of his own appointment, to seize and take by distress, from the Bank of the United States, or one of its branches, a sum of money assessed by an act of the legislature on the branch, as a tax due the State for exercising the corporate franchise within the State. The officer so appointed executed the war-

Case of Os-
born vs the
Bank of the
U. S. cited,
and its prin-
ciple stated.

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 vs.
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rant, took \$100,000, and deposited it with the Treasurer, who received it, and the bill brought by the bank with injunction, made the Auditor, the officer ther attempts to execute the act of the legislature, and of distress, and Treasurer, parties, restraining furpraying a restoration in specie of the sum already taken. It was objected, that the State was not suable; that it was a controversy between the bank and the State, substantially; and of course, that the suit would not lie. It was ruled by the court, that if the State had been liable to suit, the bank would have had its election, to sue the State, or her agents, who had become liable, by attempting to execute a void act, under which they could not justify; and of course as the State could not be sued, her exemption did not defeat the cause of action against the agents; that they, by executing a void act, were personally liable, and by reason of that personal liability, they were proper parties, and therefore the proceedings against them might be sustained without joining the State, just as the actual trespassor, who commits his trespass at the command of another, may be made responsible alone, without uniting the person who gave the command.

Auditor and treasurer cannot be made parties to a suit, as garnishees or stakeholders of the public money.

In this case, there is a total want of personal liability on the part of the Auditor or Treasurer. There is no claim against them as individuals; and as officers, they are not appointed to defend for the State, and of course there is a total defeat of parties here as garnishees, or stakeholders of the fund, which the chancellor is called upon to subject.

Creditor of the state cannot be compelled, by bill under the act subjecting choses in action, to assign his warrants on the treasury, or otherwise transfer the demand to his creditor.

As the State is not suable, and the Auditor and Treasurer are not proper parties in lieu of the State, it remains to inquire whether this bill can be sustained against Divine alone, and whether the chancellor ought, or ought not, to compel Divine to transfer this claim, or to give an authority to the Auditor to draw, and the Treasurer to pay over to the complainant. It may be urged that the equity of such a course is strengthened, because Divine has a right to the fund, and the complainant cannot make the person who owes it a party, to subject it.

This money due from the State, was no part of

the estate of Divine until he received it, because the claim attached to no specific money, and therefore not within those expressions of the act, which subject estate, real, personal or mixed.

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VS.
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Nor can it be strictly said to be a chose in action, which literally signifies a thing for which an action may be brought, and we have seen that no action would or could be brought for this sum, in favor of Divine, against the State.

Demand on the state is not a chose in action, within the statute.

But as Divine might have proceeded by mandamus against the Auditor and Treasurer, to compel them to pay this money out of the Treasury, in case of their refusal, it may be urged, that the claim comes within the spirit of the term, chose in action, and therefore is at least within the equity of the act.

Creditors of the com'th for whom there had been appropriation by statute, may, it seems, maintain a mandamus against the auditor and treasurer, to compel them to pay the money out of the treasury.

This reasoning is entitled to weight, and might command our assent, was it not for another rule of law, which operates to the exoneration of this claim. It is a rule, that the commonwealth is not embraced by an act which is made to operate between individuals, unless there is something in the act which shews an intention to subject the State to the same rule.

State is not embraced by an act made to operate between individuals, unless such intention is apparent in the act.

The act unquestionably intended to subject the debtors of a debtor to the demands of the creditor of but one of them. But did the legislature intend to make the State such a debtor as that she should be compelled to pay her debts, to the creditor of her creditor? We conceive not; and evils might result to the public weal, if contracts made with the State, could, by construction only, be emptied, and made fruitless at the instance of the creditors of her contractor.

Act subjecting the debts due a judgment debtor to his creditors, does not embrace a debt due by the state.

The credit of the contractor with government, may, and frequently does, depend upon the credit of the government, the belief that government is able, enables the contractor to obtain what the government needs; and if other creditors can change the destination of the fund, the contractor may sink, and the government suffer injury by the failure.

Effect of the contrary construction.

To make the matter more palpable, we will apply the rule to the government of the United

Same law, it seems, of

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debts due
from the U.
States.

States, and suppose that creditors of her mail contractors, or contractors for the sustenance of the army, could compel such contractors, by the decree of a court of equity, to assign over and transfer the securities and vouchers of the government, for the demands due, and becoming due, from the government. How often, in that event, might the transportation of the mail fail, by such an interference of creditors, or the sinews of war be cut, and an army be left destitute. Government, as a sovereign, may contract with whom she will, and the credit, which she gives by her obligation, may be, and frequently is, the only credit, which her contractor possesses. If that credit can be directed to other debts, instead of the supplies of the government against the will of her contractors, injury to government, and disgrace to the officer, may be the consequence. It would be a mortifying circumstance, to see a member of the legislature rendered unable to pay his sustenance, while attending on its session, because a creditor, who never dealt on the credit of the fund should by injunction, detain his compensation, on which he obtained credit with his host. Many instances of public injury, and of disgrace to officers, might be produced, which would result from supposing that the debts due from the government to her officers and contractors were subjected by the act, to the same rule with individual debts which induces the belief, that this class of debts, or choses in action, if such they can be called, were not intended, and that without express direction, the courts of equity ought not to bring such contracts of the State to the same footing with other contracts and debts. It will be proper that the legislature should first expressly determine how far with safety the State's own contracts and engagements shall be thus involved in danger.

Decree,
judge Owsley
dissenting.

The decree, Judge Owsley dissenting, is reversed with costs; and cause remanded, with direction to dismiss the bill with costs.

Dissent of Judge OWSLEY.

I HAVE not been able to bring my mind to assent to the construction put upon the act

of assembly on which this case turns, by a majority of the court, or the conclusion to which that construction leads. I perceive no good reason for excepting out of the act debts due from government, whilst debts owing by one person to another are admitted to be within it. The interest, which the person to whom debts of either sort are due, has in the money, according to my understanding, comes literally within the provisions of the act. To bring debts due from government within the operation of the act, it is not necessary to maintain that such debts are strictly and technically choses in action. The act has not only subjected to the satisfaction of the judgment of creditors all choses in actions belonging to the debtor, but it has also expressly made subject to judgments all *equitable and legal interest in any estate, real, personal or mixed*, to which the debtor may be entitled; and to my mind it is perfectly clear, that the *interest* which one to whom government is indebted, has in the debt, is an *interest* to which he is entitled in personal estate. Money, as well as any other specific chattel, is personal estate, and the interest to which a person is entitled in any debt owing him, must necessarily be an interest in the money due, and of course an interest in personal estate. If by the rules and usages of equity, it were impracticable to reach debts due from government, there would certainly be great plausibility in excepting debts out of the act. But whilst I admit government cannot be sued, I discover no difficulty in reaching any debts which she may be owing to others. It cannot be done by process against government, but it may be done by acting on the person of him to whom the debts are owing; and although by legislative enactment, the decrees of courts of equity may now, in cases where such a course is proper, be enforced by writ of execution, in ancient times they were most generally enforced by acting on the person of the defendant; and there is nothing in the act of the legislature prescribing a different course, to prevent the court from enforcing its decree, according to the former practice and usage.

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VS.
HARVIE.

Dissent of
Judge OW-
LEY.

Though a debt be owing by government, let the

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Judge Ows-
LEY.

consideration of it be what it may, I discover no reason for protecting the person to whom it is owing in the enjoyment of it, and withholding it from the demands of his creditors, that does not equally apply to debts of any other sort. There is, in moral justice, the same obligation on a debtor to apply demands which he may have upon government to the satisfaction of debts owing by him, as there is for the application of demands of any other sort to that purpose. Nor do I perceive the danger to which government will be exposed, by making the act embrace debts actually owing by her. After the debt is payable, it cannot be important to the interest of government, whether the money is paid over to the person with whom it was contracted, or to any other. Though the payment be made to another, the wheels of government may move on as before, without the apprehension of danger to the post office establishment, or fears that members of the legislature may be disturbed in their official deliberations. I view the act in the light of a remedial statute, and conceive that instead of a strict construction, it should be expounded liberally in favor of creditors, for whose benefit it was enacted.

My opinion is, that the debt due from government to Divine is within the provisions of the act, and that he should, by the appropriate decree, be compelled to furnish the necessary means to enable the complainant to recover the money.

Denny, Haggin and Loughborough for appellant;
Marshall and Crittenden for appellee.

ADMINIS-
TRATION.
Case 102.

White vs. Brown.

Error to the Franklin County Court.

Administration. Records. County Courts.

June 27.

Judge MILLS delivered the Opinion of the Court.

On the 18th day of April, 1814, administration of the estate of William White was granted, by the county court of Franklin, to Anne White, widow of the decedant, Willis A. Lee, and John A. Mitchell.

On the 21st January, 1822, the county court, entered up an order directing the administrators, Lee and Mitchell, omitting the administratrix, to be summoned to appear at the next court and give additional security; and that until they did give such security, they be restrained from acting as administrators. On the 18th of February, 1822, another order was entered, directing the same administrators, as well as the administratrix, to be summoned to appear at next court, to give additional security as administrators, and that until they gave such security they be restrained from acting as administrators.

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vs.
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Orders requiring the administrators to give additional security.

It does not appear, that notice of either of these orders were ever given to the administrators, or that any summons ever issued; nor is there any further step taken in pursuit of the administrators.

On the 16th of February, 1824, administration of the same estate was granted to Robert Brown, as an original grant, and not as administrator *de bonis non*. Nor is there any thing said concerning the former administrators, or their office.

Administration granted to Brown.

On the 21st October, 1826, Anne White, the survivor, the two former administrators having departed this life, sued out this writ of error to reverse these orders, and annul the grant to Brown.

Writ of error by the former adm'r.

To this writ Brown has pleaded the statute of limitations.

Plea of the statute of limitations.

At the time the writ of error issued, more than three years had elapsed from making the orders directing a summons, and restraining the administrators from further acting. But we cannot consider these orders as a final disposition of the first administration. Indeed, they are no more than the commencement of proceedings against them, which might ultimately terminate in a loss of their fiduciary character, and restraining them in the mean time. But it is evident, that these orders did not revoke the grant; and as to the order restraining, it does not appear ever to have been made known to them. In short, these orders can hardly be said to be a pending prosecution against them. They are no

The time of the limitation to a writ of error to an order of the county court, removing an administrator, shall be calculated from the final order which in effect revokes the grant, not the order suspending his powers.

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vs.
BROWN.

more than a commencement, which, for any thing that appears, was abandoned. Between the grant to Brown and the emanation of the writ of error, three years had not elapsed; and this is the only order that can be construed, even by implication, to terminate the power of the first administrators, by delegating similar powers to another. Of course there is no bar to the writ.

A second grant of administration, without revoking the first grant by regular proceeding, is erroneous, and reversible here, on the complaint of the first administrator.

In such case, all the orders touching the administration of the same estate, made at different terms, constitute one record of the one case: Judge Owsley dissenting.

The grant of administration to Brown, while the first grant existed unrevoked, was evidently erroneous. It is certain the former grant existed. What effect the restraining order might have upon it, we need not enquire, as they had no notice thereof; and of course it could have no effect upon them. Whatever may be the powers of the court over administration once granted, it is clear, that the grant being once made, there is no power to repeat it to others, until the first is revoked.

Judge Owsley does not concur in reversing the last order, not because the court had a right to grant it, during another existing grant; but because he conceives the order making the grant to Brown, a complete record; and that the court, in considering it, ought not to take notice of the previous grant. On the contrary, the majority of the court supposes, that all orders touching the administration of the same estate, may be considered as part of the same record, and be noticed as such.

The order of the court granting the administration to Brown, must be reversed, and annulled with costs.

Brown for plaintiff; *Denny* for defendant.

Herndon's ex'ors vs. Bartlett's ex'or.APPEAL TO
THE CIR. C.

Error to the Franklin Circuit; HENRY DAVIDGE, Judge.

Case 193.

Lapse of time. Judgment. Executors. Statute of limitations.

Judge OWSLEY delivered the opinion of the court.

June 28.

THE executors of Herndon sued the executor of Bartlett, by warrant before a Justice of the peace, and recovered judgment for twenty nine dollars and fifty nine cents, besides interest and cost.

Case stated.

The executor of Bartlett appealed to the circuit court, and a jury being there dispensed with, and, by agreement of the parties, both law and facts submitted to the determination of the court, judgment was rendered in favor of the executor of Bartlett.

To reverse that judgment the executors of Herndon have prosecuted this writ of error.

The object of Herndon's executors in bringing their warrant before the justice, was to recover of the estate of Bartlett the amount of a judgment, which they claim to have been rendered against him in their favor by one of the district courts of the State of Virginia, at the May term, 1806. On the trial in the circuit court, the executor of Bartlett denied that any such judgment had been rendered against his testator; but if it had, he contended that the amount thereof had been paid, and relied upon lapse of time as evidence of the payment.

The whole evidence introduced on the trial, was spread upon the record, by bill of exceptions.

The transcript of the record from the district court of Virginia, is conclusive evidence that judgment was rendered by that court, in favor of the executors of Herndon, against the testator, Bartlett. The judgment purports to be against the plaintiff in court, without naming him; and by the transcript of the record, the action seems to have been brought by, and prosecuted in the name of, the testator, Bartlett, attorney in fact for John White; so that Bartlett, and not White, must be understood to be

Judgment for defendant in a suit, by B, attorney in fact for W, is a judgment against B, and he may be sued in an action on such judgment.

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ex'ors.
vs.

BARTLETT'S
ex'or.

Lapse of time
less than 20
years, may or
not, be suffi-
cient evi-
dence of pay-
ment.

the person against whom the judgment was rendered by the court.

The main question relates to the lapse of time between the judgment by the court of Virginia, and the suing out the warrant in this case from the justice.

The warrant is dated the 17th of November, 1825; and the judgment was rendered by the court of Virginia, in May, 1806; so that there was not twenty years between the rendition of the judgment and the date of the warrant. But from the transcript of the record, which was certified by the clerk of the court of Virginia, in 1818, it appears that an execution issued upon the judgment, in favor of Herndon's executors, as long ago as the 28th of June, 1806, and that it has never been returned to his office; and although full twenty years had not run between the judgment and the date of the warrant, it is contended on the part of the executor of Bartlett, that from the fact of an execution having issued, and not being returned in connexion with the lapse of time which actually run, payment of the judgment was correctly presumed by the circuit court. We, however, under all the circumstances proved on the trial, think differently. We would not be understood to say, that no circumstances can, in connexion with the lapse of less than 20 years, warrant a presumption of payment; but it is intended to say, that the circumstance relied on by the executor of Bartlett, and to which we have adverted, is insufficient, when considered in connexion with other evidence contained in the record, to authorize the conclusion that the judgment has been paid.

Effect of the
fact, that an
execution
had issued on
the judgment
and never re-
turned; of the
removal of
the defend-
ant, and non-
residence of

If, at the date of the execution which issued from the office of the court of Virginia, Bartlett had resided in that state, or had property there; the fact of the execution having issued, might be plausibly urged as a strong circumstance in support of the presumption of payment. But it was proved, or admitted, by the parties, that before the judgment was rendered by the court of Virginia, Bartlett resided, and continued to reside until his death, in this state; and there was no evidence introduced conducing to prove, that

after he left the state of Virginia, Bartlett ever had any property there, which could have been reached by execution. And not only so, but it moreover appears from the record, that the executors of Herndon have at all times been non-residents of this state; and that about two or three years before the date of the warrant, the record of the suit in Virginia was presented to Bartlett, and payment demanded; and without even alleging that he had paid the judgment, he replied that he would take the advice of counsel; and after having done so, said he was advised that he was not bound to pay it. These circumstances, we think, go not only to repel any favorable inference which might otherwise have been drawn from the issuing of the execution, but they also go to weaken the effect of the lapse of time between the judgment and the date of the warrant. For although, as a general rule, after the lapse of twenty years, either a debt due by bond or judgment will be presumed paid, the presumption is but a presumption of fact, and may be repelled by proof of any incompatible facts. Accordingly; it is said, that the presumption does not arise, where the obligor has resided abroad during the whole of the time: 2 Starkie's Evi. 309. See also the case of Reardon vs. Searcy's heirs, 3 Marsh. 544.

We have thus far been considering the case upon general principles, applicable to presumption of payment from lapse of time, and according to those principles we feel constrained to say, that upon the evidence contained in the record, no presumption of payment can be fairly inferred.

But the judgment was rendered in the state of Virginia, and as that state has a statute limiting the time for suing upon judgments to ten years, it may be contended, that under the constitution and laws of the United States, no greater effect should be given in this state to the judgment, than would be given to it in Virginia; and that after the lapse of ten years from the judgment, the executors of Herndon should not be permitted to recover in an action on the judgment in this state.

Without, however, going into the question, whe-

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ex'or.

the plaintiff;
and state-
ment of de-
fendant, in
support, and
against the
presumption
of payment
from lapse of
time.

Act of Vir-
ginia limit-
ing the ac-
tion on a
judgment to
10 years, does
not apply
where the de-
fendant re-
moved from
the state be-
fore the judg-
ment was re-
covered; the

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proviso of the
act excludes
such cases.

ther or not the constitution and laws of the United States should be construed to have any application to the acts of limitations, which any state may adopt as to the time in which judgments may be enforced, it is a sufficient answer to the argument, that the Virginia act of limitation to which the argument alludes, contains a saving as to persons against whom judgments are rendered, removing from that state; and we have seen, that Bartlett had removed from the state before judgment was rendered against him; so that his executors can derive no benefit from that act, even were it admitted to have any influence in this state, over actions brought here upon judgments of that state, as was decided by this court in the case of *Thompson vs. Cobb*: 1 Marsh. 507.

Judgment,
Chief Justice
dissenting.

A majority of the court, the chief justice dissenting, are of opinion, that judgment should have been rendered in favor of the executors of Herndon. The judgment must be reversed with cost, the cause remanded to the court below, and judgment there entered for the amount of the Virginia judgment and cost.

Dissent of Chief Justice BIBB.

IN December, 1825, Herndon's executors sued and obtained judgment against James Bartlett's executor, Ireland, by warrant before a justice. Ireland appealed to the circuit court. By consent, the cause was "submitted to the court for final judgment without jury." Upon hearing of the parties, the circuit court reversed the judgment of the justice, and gave judgment for the executor, Ireland. The executors of Herndon moved the court to set aside the judgment, and grant a new trial; which motion was overruled. The executors of Herndon filed a bill of exceptions to the opinion of the court in refusing to set aside the judgment.

The bill of exceptions states, that the parties at the trial agreed to dispense with a jury, and to submit the law and evidence to the court, without the formality of drawing the pleadings.

The plaintiff in the warrant, gave in evidence the record of the proceedings in the District Court of

Virginia, holden in Fredericksburg, in an action in which James Bartlett, as attorney in fact for John White, declared against the said executors of Edward Herndon, in assumpsit; that the said executors and the plaintiff accounted together for moneys due and owing from their testator, Edward Herndon, in his lifetime, to said John White, and upon that account the defendants, executors of Herndon, were found in arrear to said John White, in the sum of £391 3s. 5d. and in consideration thereof, assumed to pay said sum to the said plaintiff. The defendants pleaded non assumpsit. After jury sworn to try the issue, the plaintiff suffered a non suit, and thereupon the said defendants had judgment against said plaintiff for costs, amounting to \$29 39. The suit was commenced in October, 1803; the judgment was rendered in May, 1806.

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ex'ors
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ex'or.

Dissent of
ch. jus. BIRB.

The executors issued an execution, on the 28th May, 1806, against the goods and chattels of the plaintiff, which has not been returned into the office, as the record states. The record is certified in due form of law, on the 6th June, 1818.

It was admitted by Ireland, that he was the executor of James Bartlett.

The plaintiffs in the warrant, the executors, of Herndon, were, and ever had been, non residents of Kentucky.

James Bartlett had resided in Kentucky twenty years, and was always solvent.

Two or three years before the warrant, the record was presented to Bartlett for payment, as the witness was informed, by Ireland, Bartlett replied he would take the advice of counsel, and was advised he was not bound to pay it, and he accordingly refused. This, the bill of exception states, was all the evidence.

It was argued for the executor, that the judgment of Virginia is against White. I think the judgment is against Bartlett. It may have been, that the awkward mode of declaring, in the name of Bartlett, attorney in fact for White, upon a demand accruing

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ex'ors
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ex'or.

Disent of
Ch. Jus. BIBB.

to White, and laying an assumpsit to the plaintiff, Bartlett, which he could not prove, although the demand might have been due to White, produced the non suit. But James Bartlett was the plaintiff who was non suit, and against whom judgment for costs was given.

Payment, release, or acquittance, may be presumed from length of time. The lapse of time is presumptive evidence of such facts. It is so treated in *Shield vs. Perkins*, 2 Bibb, 367. This presumption may be repelled by circumstances; and it is true, that residence in different states may be used to repel the presumption of payment, or other acquittance. But that, also, is but presumptive evidence against presumptive evidence. And I think the presumption of satisfaction is very strongly fortified, by the fact, that execution issued speedily after judgment, which execution has never been returned. So that, for aught that appears, satisfaction might have been received by force of the execution. Questions of payment of bonds have been left to the jury, upon presumption, from sixteen years. A demand was made of the testator in his lifetime; he refused to pay, and returned for further answer, that he was not bound to pay. This was no acknowledgment of a debt, but directly the reverse. Yet the refusal is not pursued by action; the suit was still delayed until the death of Bartlett, and then it is prosecuted against his executor. Although the judgment is technically against Bartlett, yet the demand sued for was evidently accruing to White; he may have paid it; where he lived is not stated. The presumption of satisfaction arising from such great length of time, near twenty years, is matter of fact; difference of residence does not, as matter of law, do away that presumption positively; that also is matter to be left to a jury. The judge in this case was substituted in place of the jury, by agreement of the parties; he presumed payment. Suppose a jury had presumed payment or satisfaction, ought the appellate court to disturb the verdict? Are there not strong circumstances in favor of such an inference? Satisfaction, or no satisfaction, must at best remain in *dubio*, after taking into consideration

the difference of residence of the parties, and weighing that against length of time and the other circumstances. The residence has not been changed since judgment. Bartlett lived in Kentucky when the suit was brought. Considering that presumption of satisfaction from length of time is founded on a great principle of public policy, necessary to the repose and security of society, I do not think this court would have disturbed the verdict of a jury for the defendant; and I think the case stands before this court as if a jury had tried the cause. According to the established doctrines of this court, a new trial will not be granted, where a jury have found a verdict upon presumptive evidence on the one side and presumptive evidence on the other, where the scales of evidence are nearly equipoised. As a jurymen, I should find for the defendant; and I cannot consent to reverse the judgment of the circuit judge for so finding.

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EX'ORS
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EX'OR.

Dissent of
ch. jus. BIBB.

My opinion is, that the judgment be affirmed; and by the opinion of the majority of the court final judgment is to be entered for the executors of Herndon.

Dana for plaintiff; *Crittenden* for defendant.

Tribble vs. Taul.

Error to the Clarke Circuit; GEO. SHANNON, Judge.

CHANCERY.

Case 104.

Set-off in equity. Jurisdiction. Judicial decisions. Constitutional law.

Judge MILLS delivered the Opinion of the Court.

June 28.

A NOTE was given by Taul to Jones, who sold it to Tribble without assignment. Tribble, in the name of Jones' administrator, after his death, brought his warrant against Taul, and recovered judgment before a justice of the peace.

Taul filed this bill for a set off against the judgment, and obtained it, setting up an account for fees due him, for services as counsel and attorney at law, from Tribble, rendered in different suits.

Bill for set-off
against judgment
at law.

7th 455
614 197
614 726

TRIBBLE
vs.
TAUL.

Set off in equity allowed only when it appears there is some obstruction to the recovery of the demand at law, or there is an agreement to set off, a connexion between the demands, or other circumstance to give the chancellor jurisdiction.

Necessity of the uniformity and stability of the decisions of this court.

We conceive that the set off ought not to have been allowed, for a defect of jurisdiction in the chancellor. There is no insolvency or absence of Tribble suggested, or any obstruction to the operation of due process of law against him, and the claims of Taul are entirely legal, and not of an equitable character peculiar to a court of equity; nor are they such over which the chancellor can assume jurisdiction concurrent with a court of common law.

There is no connexion between the demands; one does not form the consideration of the other; nor is there any promise or agreement to set off one against the other. In short, we discover no circumstance calculated to draw the claim of Taul under the power of the chancellor. According to the settled law of this court, therefore, the set off ought not to have been allowed.

But a difference of opinion among the members of the court, requires that we should say something farther on the principles which we have recited as regulating courts of equity. If we were convinced that on this point the law was settled wrong originally, we should not feel ourselves at liberty to depart from it; aware, that it is of greater importance to society, that the rule should be uniform and stable, than that it should be the best possible rule that could be adopted. In the supreme court of a state, as this is, possessing, with but few exceptions, appellate judicial power co-extensive with the state, the influence which its decisions must have, is evident. Its mandates are conclusive, and even its *dicta* are attended to in all the inferior courts. No sooner is a decision published, than it operates as a pattern and standard in all other tribunals, and as a matter of course, all other decisions conform to it. If in this court, a settled course of adjudication is overturned, then the trouble and confusion of reversing former causes succeeds in the inferior tribunals; and even the credit and respect due to this court is shaken, by the phenomenon that A has lost his cause on the same ground that B gains his. And not only do these consequences follow, but some still more serious may ensue. For perhaps no court

may strike the vitals of society with a deeper wound than a capricious departure in this court from one of its established adjudications. We ought, therefore, to be cautious not to leave a course well understood; and nothing but the imperious demands of justice could justify it. Here there is no such demand upon us.

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Now, when it is known to us, that for a space of time not much short of twenty years, the principles which we have now recognized have governed all cases of set-off in equity, we should not depart from them now. It has been considered, and is still held as the well settled doctrine of this court, that anterior to the statute of set off, courts of equity never did entertain jurisdiction of set off, except in such cases as the following.

The demands must be connected, or one must form the consideration of the other; or

Cases in which sets off in equity may be allowed.

There must have been an agreement to set off the mutual demands; or,

They must have been demands already completely liquidated and settled at law, such as mutual judgments; or,

There must be some obstacle to the complainant, who strove to set off his claim, proceeding at law, such as nonresidence, insolvency, or the like; or,

The claim must be one over which chancery held either exclusive or concurrent jurisdiction originally.

This being the ground on which the doctrine of set off stood in equity before the statute, it is not changed by the statute; nor is the broad and illimitable rule adopted, that wherever there are mutual claims, of whatever character, there the chancellor will interfere with the case.

Statute of set off at law has not enlarged the jurisdiction of courts of equity.

That the law was so settled, independent of the statute, is evident by consulting Montague, p. 1, and the language of lord Mansfield in the case of *Green vs. Farmer*, 1 Black. Rep. 651, in which he says:

“The justice of allowing cross demands is supported by natural equity; the balance only is really
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law against
sets off, before
the statute.

due in such cases. But the common and established forms of law have in general directed separate remedies to be mutually had, by different actions; and though where the nature of the transaction consists in a variety of receipts and payments, the law allows the balance only to be the debt; yet where the mutual debts stand *unconnected* with each other, the law hath said they shall not be set off: *courts of equity have followed this rule merely because it was the law.*"

This we conceive will be found to be the settled rule of equity, after all the English cases are examined; and we conceive it would be difficult to find one adjudicated case of any authority, which adopted a different rule.

Cases of sets
off in equity
cited.

This doctrine has governed this court from its origin, and all the cases, relating to set off in equity will be found to wear the impress of this principle on their face. Hence the court will be found speaking, as in the case of Durrett vs. Kenton, 4 Bibb, 207, in such language as this:

"With respect to a credit claimed by Durrett for a fee bill, which issued from the clerk of the federal district court against him, Simon and John Kenton, and which has been paid by Durrett, it need only be remarked, that as it appears to *have no connexion* with the main subject of contest, and as Durrett has ample remedy therefor, in the ordinary mode of action, we suppose the circuit court properly refused to allow a credit in consequence thereof." So in the case of Pryor vs. Richard's adm'or, 4 Bibb, 357, it is said:

"With respect to part of the former (demands) as they are not even alleged to be in *any manner connected with that upon which the administrator obtained the judgment against Pryor*, they do not, *per se*, form a sufficient cause for applying to a court of equity for relief. But as both parties allege the estate to be insolvent, that, we suppose, furnishes a good reason for the interposition of the chancellor."

Such is the language often used, of which we could give more instances, if we conceived it necessary. The cases do not stop to investigate or prove

the principle; but refer to it as existing, as incontestible, and at rest. We do not therefore feel willing to become empirics in jurisprudence, and to change by one mandate the current of decision, which has long run undisturbed through all the tribunals of the country; and we forbear to enlarge the jurisdiction of the Chancellor beyond its settled and undisputed limits.

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Indeed, if we were to do so, and to permit every defendant at law, who might have purely legal and unconnected claims against his adversary, to go into equity without any good cause, and there try and liquidate his demands, and there discount them, we might introduce a course of decision, in many cases questionable on constitutional ground. By changing the form, we might permit such complainant to deprive his adversary of the right of trial by jury, which must remain inviolate. Indeed, in this case itself, we should be on the boundary line of such an error. For the demand of Taul is not only legal, but is a *quantum meruit* for his services as counsel, without any stipulated price, which is peculiarly proper for the liquidation of a jury.

Query of the constitutional power of this court to depart from the adjudged cases, and enlarge the equity jurisdiction.

The decree of the court below, the Chief Justice dissenting, must therefore be reversed, with costs; and the cause be remanded, with directions to dissolve the injunction, and dismiss the bill with damages and costs.

Dissent of Chief Justice BIBB, on the question of set off in equity.

THE circuit court has decreed a perpetual injunction against a judgment at law, obtained by Tribble in the name of Jones' administrator. The administrator of Jones confesses he has no interest in the judgment against Taul, that the note was passed to Tribble without assignment. Tribble acknowledges that he did obtain the judgment in the name of Jones' administrator, but for his own use and benefit; he admits that he did refuse to discount this note out of the account exhibited against him by the bill. The proof sufficiently establishes an account due the complainant, for services as his

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attorney and counsellor at law, to an amount exceeding the judgment at law.

According to my understanding of the principles of equity, this is a plain case for the interference of a court of equity. These cross demands could not have been set-off in the suit at law; because the suit was in the name of Jones' executor, and Taul's demand is against Tribble, who is the equitable assignee.

But even if those demands might have been set-off at law, yet as Taul did not attempt such defence at law, the jurisdiction of a court of equity does embrace the case, in my opinion.

Payment and set-off I consider as subjects of equitable jurisdiction. When there are opposite demands between two persons, and the accounts are connected, by originating in the same transaction, or by subsequent agreement, the balance is the debt, and is the sum recoverable by suit. When the accounts are unconnected, by originating and continuing in distinct transactions, each demand is a legal debt, and recoverable by separate actions; but such accounts may be balanced by setting-off one debt against the other, either in law or in equity. (Montague on Set-off p. 1.)

"The law relating to the balancing of unconnected accounts is called the law of set-off." (Montague p. 2.)

There are three cases of set-off; at common law, by statute, and in equity.

Set-off in equity prevailed long before the statute (*ex parte*, Blagden, 19 Vez. 467. Hughes vs. McCoun's administrator, 3 Bibb, 255.) The statute which allows set-off at law of mutual debts, does not take away the equitable jurisdiction of the court of chancery, even in cases which are cognizable at law. Courts of law and courts of equity have concurrent jurisdiction in some cases of set-off; courts of equity have jurisdiction of some cases which are not cognizable at law; and courts of equity in the cases of set-off cognizable at law, will ex-

ercise jurisdiction, unless there has been a trial of the matter of set-off in the court of law. So said the judges of this court, in the case of *Hughes vs. McConnel*, 1 Bibb, 256.

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At law, if the demands have connexion by originating in the same transaction, or by subsequent agreement of the parties, then the balance only is the debt recoverable at law. The plaintiff at law would be non suited, if upon such balancing of the cross demands he was in arrear, or if nothing remained due him such cases of connected transactions needed not the aid of the statute, they were to be set-off at common law. *Dale vs. Sollett*, 4 Burr. 2133. *Green vs. Farmer*, 4 Burr. 2221.

But if the cross demands have no connexion in their origin, nor by subsequent agreement, yet they may be set-off at law by force of the statutes; if mutually existing debits and credits between plaintiff and defendant, that is sufficient. Thus, a debt by simple contract may be set-off against a debt by specialty. *Bull. N. p. 179*; *Brown vs. Holyoak*; and many cases since.

At law, connexion between the cross demands or the want of it, was an important consideration before the statutes of set-off. Since the statute, such connexion is unnecessary except so far as it may involve the question whether a plea or notice of set-off is or is not necessary to let in the defence. Such is the doctrine of the courts of law, before and since the statutes.

The rule of set-off in equity, so far from being narrowed, is far more comprehensive, and embraces cases which cannot be properly allowed, either at common law or by the statutes of set-off. There are no prohibitions in the statutes of set-off against the exercise of the jurisdiction of the courts of equity.

In the case of *Collins vs. Collins*, (2 Burr. 825-6,) the question was, whether a set-off was pleadable to a bond with condition to an annuity of £10 per year for life, and likewise to maintain the plaintiff in meat, drink, washing and lodging. Lord Mans-

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field in delivering the opinion of the court, says, in speaking of the statutes of set-off, "Since these two very beneficial acts, stoppage, or setting-off mutual debts, is become equivalent to actual payment; and a balance shall be struck, as in equity and justice it ought to be."

"At common law, before these acts, if the plaintiff was as much, or even more, indebted to the defendant than the defendant was indebted to him, yet the defendant had no method to strike a balance; he could only go into a court of equity for doing what is most clearly just and right to be done."

"The statute, 2 Geo. 2 c. 22, was made to answer this just and reasonable end, and enacts generally, that where there are mutual debts between the parties, one debt may be set-off against the other." The statute of 8 Geo. 2 c. 24, was enacted to obviate doubts which had arisen upon the former statute, as to the different nature of the debts: Collins vs. Collins, 2 Burr. p. 825-6.

Again, in Green vs. Farmer, (4 Burr. 2220,) Lord Mansfield, speaking of the statutes of set-off, and the progressive statutory remedies enacted to cure the defects in the administration of justice in the courts of common law, uses these emphatic expressions: "Natural equity says, that cross demands should compensate each other, by deducting the lesser sum from the greater, and that the difference is the only sum which can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, had said that each must sue and recover separately, in separate actions." He then notices the progressive enactments produced by cases in which "the natural sense of mankind was shocked" at this rule of law, which forbade mutual debts unconnected to be set-off, and drove each party to this separate action.

To my mind it is very clear, that the statutes of set-off were made to remedy this defect of justice in the courts of common law, which drove men to separate actions upon their cross demands; and sent them into courts of equity to get that balancing of

cross demands which natural equity and the good sense of mankind says is just and right. The statutes did not create the equity; that pre-existed; the statutes of set-off did but follow the course of equity. The statutes of set-off followed in the wake of the courts of equity, like the statutes for relief against the penalties of bonds, and covenants, and for allowing pleas of payment of the condition, after the day. It is very clear, that in cases of which the courts of equity and courts of law have concurrent cognizance, a mere neglect to defend at law does not oust the court of chancery of its jurisdiction; there must have been a defence at law upon the same matters, to bar the relief in equity. So the investiture of jurisdiction in the courts of law, by statutory enactments, of cases formerly cognizable in equity, does not divest the courts of equity of their former jurisdiction, unless there are prohibitory words in the statute; the consequences, as I think, of the statutes of set-off, are that courts of equity and courts of law, have concurrent jurisdiction of those subjects.

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The difference of opinion between my associates and myself, in this case, consists in this;—by their opinion, because no insolvency of Tribble is suggested, because there is no connexion between these cross demands, the one not being the consideration of the other, and there being no promise or agreement to set-off the one against the other; therefore it is inferred, that the demand and complaint of the complainant, Taul, is entirely legal, not of an equitable character, and the cognizance of the court of equity is therefore denied. I agree that there is no connexion of these cross demands, in their origin, or by agreement to set-off; and that there is no insolvency suggested; but yet I consider the absence of such ingredients as no objection to the cognizance of a court of equity. It is enough for me, that the defendant, Tribble, has not barred this application to the court of equity, by shewing that the claim was litigated at law. I go upon the broad and general proposition, that the set-off and balancing of the demands as claimed by the bill, is a subject properly of and belonging to equity. The fact that these demands were unconnected, either in their or-

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igin, or by agreement of the parties, proves nothing more than that they could not have been set-off at law, before the statutes of set-off. The fact that they are so unconnected, shews them to be within the reason and policy of the statutes of set-off: that they are subjects of equity, and equitable jurisdiction, according to the doctrine in the cases of *Collins vs. Collins*, 2 Burr. 825-6; *Green vs. Farmer*, 4 Burr. 2220; *Barker vs. Braham*, 2 Wm. Black. 869; s. c. 3 Wils. 396; *James vs. Kynnier*, 5 Vez. 110; *Lanesborough vs. Jones*, 1 Pr. Wms. 325; *ex parte Ockenden* 1 Atk. 235; *ex parte Quintin* 3 Vez. 248. *Payne vs. Loudon*, 1 Bibb 512.

I think that set-off, is properly a subject of equitable jurisdiction, founded in natural equity and justice, and that the statutes of set-off have only divided the jurisdiction of some of the cases of mutual credits and debits, between the courts of law and courts of equity, and that there is moreover a class of cases to which the statutes of set-off do not extend—but which are nevertheless cognizable in equity, and that this case is one of peculiar and exclusive cognizance in equity.

In *Barker vs. Braham*, 2 Black. 869, De Grey, chief justice, said, “the common law was very narrow in its principles, with respect to stoppage or set offs; very different from the Roman law of compensation, which proceeded on a more liberal plan. This our courts of equity adopted, made just allowances to each side, and struck the balance: *Jeffs and Wood*, 2 Wms. 128. But there was not any legal interposition of this kind, till the bankrupt laws, 4 and 5 Ann; and 5 Geo. I. and 5 Geo. II. The statute of Geo. II. allowed set off to be pleaded, or given in evidence, at the trial. In the construction of this statute, lord Hardwicke, chief justice, differed from Eyre, chief justice, with regard to setting off debts of superior nature against inferior; and vice versa. This occasioned the statute, 8 Geo. II. The courts have gone a little further than the letter of the statutes, by the rule of analogy, in cases within their power. Costs have been set off against costs; and in *Barnes and Crofter*, the court allowed costs to be

set-off against debt and costs. The present case goes a step farther; it is an application to us to restrain and narrow our own process of execution, by the same equitable rule. Doubtless this judgment in the King's bench might have been pleaded or given in evidence. But that is no reason why we should not allow it now; and no mischief can follow from allowing it." Blackstone, justice, concurred; and said, "The courts have been gradually extending this equitable remedy. In the out set of a suit, they compel the plaintiff to make a set-off in the affidavit to hold to bail, and will not let him swear to one side only of the account. So in costs at the close of the suit, the same reason and the same analogy extend to set-off mutual judgments, and thereby narrow the greater execution, in whatever court it happens to be." Gould and Nares concurred; and so the court of common pleas, upon motion, set-off the judgment of the court of King's bench, against their own judgment; and having deducted it, stayed the execution upon payment of the balance due.

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In this court, mutual judgments for costs have been repeatedly set-off, upon motion.

In whatever shape this question of set-off, and balancing mutual demands, has been presented, whether in cases of connected demands or of unconnected demands, before the statutes of set-off and since, in cases on trial, or to set-off judgment against judgment, courts of law and courts of equity have concurred in acknowledging that, striking a balance, and restraining the process of law from going for the collection of more than the balance due, is according to a principle of natural equity sanctioned and approved by the universal sense of mankind.

If the plaintiff sues for a debt due by simple contract, and makes an affidavit to hold to bail, by swearing to one side of the account, omitting the set off, the courts would consider it an evasion, which would not save the party making it, either from losing the security of bail, or from criminal prosecution. *Barclay vs. Hunt*, 4 Burr. 1996; *Barker vs. Braham*, 2 Wm. Black. 869.

If he sues upon a note, when he is indebted to the

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defendant in an equal or larger sum, he may be non-suited by the set-off; *Baskerville vs. Brown*, 2 Burr. 1230. After mutual judgments, the court will, on motion, deduct the smaller judgment from the larger. And courts of equity before and since the statutes of set-off, have again and again interfered to effect this just and equitable result, of balancing cross demands by setting off the one against the other.

In *James vs. Kenney & c.* 5 Vez. 110, the application was to set-off a note held by James, against his bond to the Mures, then held by the defendants, as assignees of the Bankrupts. The Lord chancellor stopped the argument for the complainant. He said, "is there any doubt; that where there are upon account mutual credits between two parties, though they cannot set-off at law, yet it is the common ground of a bill? If James had brought an action upon the note against Mure, supposing no bankruptcy had taken place, I should have stopped that action while he was debtor on the bond. When there comes a case of bankruptcy it is much stronger. They might sue Beckford's executors, (who was a co-obligor with James to whom the note was due,) but I should stop the action." The counsel for defendants argued, that the debts were not mutual; that the bond was due from Beckford and Keighly; for that James had been virtually discharged by the transactions, and that James was a stranger coming in to set-off his note. The chancellor declared he had not a particle of doubt. He said, "it might have been matter of consideration whether the bill should be filed by Keighly or James," but that giving up the bond would put an end to the suit completely, and it was accordingly so decreed.

There are cases in which complainants' coming in to equity, for set-off, ought to state special circumstances to induce the chancellor to act; as if the complainant comes in upon an unliquidated demand, and such as cannot be liquidated without the intervention of a jury: as in *Rowzee vs. Gregg*, Litt. Sel. Cas. 488; *Robinson vs. Gilbreth*, 4 Bibb, 184. But this case cannot be dismissed on that ground.

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If it were necessary to state any special circumstances to induce the court of equity to retain the cause, I think the bill and the answer contain allegations and admissions of a sufficiency. Tribble being indebted to Taul, bought a note on him of less amount than what he owed Taul. Tribble does not take an assignment of the note; but in the name of Jones' administrator, who is trustee for Tribble, the suit is instituted and conducted by Tribble, the equitable owner: Taul could not have had his set-off at law, if he had attempted it. And if he had sued Tribble and obtained his judgment, even then he could not have had the set-off of one judgment against the other, because the judgment against Taul was in the name of Jones' administrator; moreover, Tribble, when applied to, refused to set-off and strike the balance. What more can the chancellor want? Taking set-off by statute, as equivalent to actual payment, (as Lord Mansfield said in *Collins vs. Collins*,) yet Taul was prevented from pleading it at law by the act of Tribble in conducting the suit in the name of Jones' administrator. A set-off under the statute need not be connected with the cross demand in its origin, nor by after-agreement of the parties. And if it could not have been set-off at law, yet it is a good equitable set-off. A court of equity will grant relief in any case where there is an equitable, without a legal right, to set-off. (*Montague on set-off*, Book 2, p. 61.)

Payments, and set-off, are, in my opinion, subjects of equitable jurisdiction. If one has received a payment, it is fraudulent to withhold the credit, and attempt to coerce payment a second time. So to refuse obstinately to set-off a cross demand which is just, and attempt to coerce the whole without abatement, is unconscientious and oppressive, in violation of good faith and fair dealing. In either case, the chancellor ought to interpose, and prevent the contemplated injury. Whether the payment be of a part or of the whole, whether made before, at, or after the day, cannot affect the question of jurisdiction; so, whether the set-off is as to a part or the whole. These affect only the quantum of injury intended by the prosecution of the demand by legal

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process. If the payment or set-off goes to a part of the judgment at law, it is unconscientious to withhold that part and prosecute for the whole; the chancellor is bound by the principles of equity to grant the aid of his jurisdiction to act upon the conscience of such wrong doer, and prevent the wrong. Nor can I perceive how the fact that the payment or set-off has extinguished the whole sum demanded at law, can divest the court of equity of its jurisdiction, or lessen its duty to act upon the offender. The aggravation of the offence, and the increased injury which it is intended to produce, can neither purify the conscience of the offender, nor disarm the chancellor of his powers.

The grievance inflicted by withholding the set-off and coercing payment of the demand is irreparable. Suppose A to owe B £1100 by specialty, but will not pay; purchases B's note for £1000; takes no assignment, sues B, refuses the set-off, and because the suit is not in A's name, B cannot plead his set off at law, A thus coerces the money by execution. B must pay to the sheriff £27 10s. for commissions; A is not responsible to B for this sum. Moreover, in a country like this, where property is not convertible into money, but at great sacrifice, and where the estate is sold under execution without appraisement, the defendant in execution is liable to sustain still greater loss. The solvency of A, will not remunerate B's losses. B pays his debt to A with loss, not compensated by the amount which he recovers by his cross demand. The solvency or insolvency of A does not properly belong to the question of jurisdiction, but merely to the quantum of value involved in the contest.

It seems to me, that the jurisdiction of courts of equity in cases of set-off, is well established, and very properly so established; that the denial of it is calculated to encourage obstinate, vexatious, and litigious spirits, and to produce multiplied litigation, and a failure of justice.

My opinion is that the decree be affirmed.

Monroe for plaintiff; *Hanson* for defendant.

Hobbs vs. Blandford.

DETINUE.

Error to the Nelson Circuit; PAUL I. BOOKER, Judge.

Case 105.

**Husband and wife. Fraud on marital rights. Notice.
Evidence.**

Chief Justice BISS delivered the Opinion of the Court.

June 30.

In May, 1826, Francis D. Blandford instituted an action of detinue against Ezekiel Hobbs, for a slave called James.

Detinue for a slave by Fr. D. Blandford against Hobbs.

To sustain his claim, the plaintiff, Blandford, gave in evidence a writing, executed by his mother, Mary Blandford, then *sole*, afterwards the wife of said Hobbs, for the slave; the writing bears date on the 20th Feb. 1805; it purports to have been made in consideration of five pounds, to transfer the said slave, James, to Walter Blandford, on the following conditions: the said Mary to have the entire use and benefit of said slave during her natural life, after her death, the slave to go to her son, Fr. D. Blandford, by a regular transfer from said Walter, if Francis died before said Mary, the slave to be the property of said Walter, or his heirs; if Francis should die without issue, after being possessed of the negro, in that case the slave to revert to said Walter.

Bill of sale by Hobbs' wife before marriage, claimed under by plaintiff.

The plaintiff introduced a subscribing witness to the said bill of sale, who stated that it was executed on the day it bears date, that said Mary and Hobbs were then engaged to be married, and were married in seven days thereafter; that Hobbs was not present at the execution, and did not know of it, as far as she knew.

Evidence of the execution of the bill of sale.

He then introduced Walter Blandford, the grantee, and read the record of a suit in chancery, between said Francis D. Blandford complainant, and said Walter, and said Hobbs, defendants, concerning said slave, in which the complainant claimed the slave by the death of his mother, and by said writing; said Hobbs resisted the claim as fraudulent; and said Walter answered on the 20th August, 1825, by releasing all his right and interest to said Francis. This suit in chancery was instituted in July, 1825. The object of the bill was to take the negro out of Hobbs' possession, unless the defendant, Hobbs,

Record of the case of F. D. Blandford against W. Blandford and Hobbs.

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should give security not to remove the slave out of the State, but have him forthcoming to answer the decree to be made; also that he give security for the hire from the death of said Mary, the wife of Hobbs. It charged, that the value of the negro was \$500, and his annual hire \$100, and prayed for relief generally. What was finally done in this suit does not appear; the injunction and restraining order against Hobbs was discharged, in August, 1826.

Evidence
that the bill
of sale was
in frand of
Hobbs' mari-
tal rights.

Said Walter Blandford stated, that his sister Mary and said Hobbs were, at the date of said writing, engaged, as he then knew, to be married, and were married in a few days thereafter; that Hobbs was not present at the execution of the paper, and knew nothing of it, so far as he knew. In 1808 himself and Hobbs got to law about the negro; Hobbs claimed him by his marriage; he was disputing with Hobbs, and asked him if he did not know of the existence of the paper before his marriage, Hobbs stated, "that the old lady, the mother of his wife, told him there was such a paper, but he never believed it, and then claimed the negro as his own; he stated that the object of the bill of sale was to prevent Hobbs from acquiring title to the negro by the marriage; and to secure him to her son, who then lived in Virginia; that at the time of its execution said Mary and the negro boy lived with him, and so continued, as usual, until Hobbs married her, and took the negro away; that his sister had been possessed of said negro for years before her marriage; that said Mary, the wife of Hobbs, died on the 27th June, 1825; that Hobbs was, at her death, and ever since, possessed of the negro; he was worth three or four hundred dollars, and his hire about sixty dollars annually. The suit in chancery between said Francis and said defendants, and said Walter Blandford, was introduced by plaintiff, to shew said Walter's release of title to the plaintiff, Francis.

Instructions
moved by
Hobbs, refus-
ed by the
court.

Upon this evidence, the defendant moved the court to instruct the jury, that if they believed that Hobbs, on the second of July, 1805, and ever since, had possession of this negro, claiming him as his own property, in right of his marriage, and against

the provisions of the bill of sale, that then the relinquishment of said Walter given in evidence, and contained in his said answer, did not vest such a right in the plaintiff as to maintain this action; but that the right of action, if any, (if the jury believed the evidence) existed, and was vested in, Walter Blandford, and could not be transferred whilst the negro was in the adverse possession of Hobbs. The court refused so to instruct the jury.

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The defendant then offered in evidence the record of the suit in chancery, instituted in June, 1808, by Walter Blandford against said Hobbs, to restrain Hobbs, from selling or conveying away said slave, setting up this bill of sale; charging the slave to be of the value of \$400; stating that Hobbs claimed the slave as his own property, and praying that the slave be taken out of his possession, unless he will give security not to sell or remove the slave out of the State, and praying for a writ of *ne exeat*; to which Hobbs answered, insisting that the said writing was fraudulent, and made his answer a cross bill against said Walter and said Francis, to which cross bill said Walter answered in April 1809. This record, and Walter's bill, as sworn to, and his answer to the cross bill, was offered as the record states, for every legitimate purpose. The court rejected this evidence, offered by the defendant.

Record of the case of W. Blandford against Hobbs offered, but rejected by the court.

The defendant then introduced the writer of said bill of sale, who stated, that Walter Blandford applied to him, stating his sister Mary Blandford was about to marry Ezekiel Hobbs, that he said Walter wished such an instrument drawn as would prevent Hobbs from holding the negro, as he believed the said negro boy was one, if not the principal, object of Hobbs in marrying his sister, and the witness drew the bill of sale given in evidence; the witness asked said Walter if Hobbs knew of the intention to have such a bill of sale made; said Walter said no; witness told him Hobbs ought to be informed of it, said Walter said Hobbs should know of it, as he did not wish him to marry his sister; that Hobbs, from the time of his marriage, continually had possession of the slave, exercising acts of ownership.

Farther evidence of the intent of the bill of sale.

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BLANDFORD.

The defendant moved for instructions to the jury, and so did the plaintiff, which need not be particularly stated, as the opinion of the court upon the propositions asserted in the instruction, as actually given by the court in responding to the instructions of plaintiff and defendant, will be sufficient to decide the merits of the controversy.

Instructions
given by the
court.

The court instructed the jury, that if they believed that the bill of sale was executed on the day it bears date, that the release in Walter Blandford's answer given in evidence was also executed by him, that Hobbs was possessed of the slave at the institution of the suit, that his wife died before the suit, and that Hobbs had notice of the bill of sale before his marriage, then the law is for the plaintiff; but if they believed that after the said Hobbs and said Mary were engaged to be married, the writing was secretly executed, and no notice thereof given to Hobbs before their marriage, then the said writing as to him was void, and the law is for the defendant. To this instruction the defendant excepted.

Verdict and
judgment for
Blandford.

The jury found for plaintiff, the court rendered judgment accordingly, and the defendant prosecutes this writ of error.

The instruction given involves two propositions only, which require particular consideration, the release given in evidence, and the effect ascribed to notice of the bill of sale, if found by the jury.

Title acquired by the plaintiff pending the action, avails nothing.

First, as to the release. This action of detinue was commenced in May, 1826; the release of Walter Blandford is made by way of answer to Francis' bill; it rests solely upon the answer itself; this answer was put in not until the 20th August, 1826, and was not even certified before. If the writing of 1805, under which the plaintiff in detinue claims from Mary, his mother, can have any legal effect, it must be to transfer the legal right to Walter Blandford, in trust for her during life, and after her death in trust to convey to her son, as the instrument says, "by a regular transfer from the said Walter or his heirs." At the institution of this suit, the said Francis had not the legal right of property whereon to ground his

action at law. The instruction asked by the defendant, Hobbs, upon the closing of the plaintiff's own evidence, and before he opened his defence, ought, on this point, to have been given. A cause of action if acquired after suit, cannot sustain the suit instituted prematurely.

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Secondly, as to the notice. A contract to marry, is obligatory upon the parties mutually. If Hobbs had refused to perform it, the law would have sustained an action by Mary Blandford against him, for the breach. Marriage is, in law, a valuable consideration. Hobbs was, in law, protected from fraud upon the rights and consequences of the contract of marriage, which he had entered into with said Mary, his after wife. The plaintiff's own evidence conducted to prove a fraud upon the intended marriage; Walter Blandford acknowledged the writing to have been made to prevent Hobbs from acquiring the right to the slave by the marriage, which he knew to have been then contracted between his sister and Hobbs; and the defendant's evidence conducted to prove that Walter's design in procuring the bill of sale was, to break off the intended marriage. The evidence conducted to prove the bill of sale fraudulent. The evidence of Walter Blandford himself, was, and so was all the evidence, that at the time of the execution of the bill of sale, Hobbs was wholly ignorant of it, and had not been consulted; Mary lived with Walter; and the possession continued, as before, in Mary, until her marriage, and until Hobbs acquired the possession of the slave.

Conveyance of the estate of the feme, on the eve of her marriage, without the consent of her contemplated husband, is a fraud on his rights, and void as to him.

With such evidence, conducing to prove the transaction fraudulently aimed at Hobbs, the after notice of the execution of the paper, as given in evidence by the plaintiff, could not purge the fraud. Notice of an illegal and fraudulent act, after it is done, cannot render it pure and legal. If Hobbs had ratified the act, after he had notice of it, then such assent and ratification, (if the evidence had conducted to prove any such,) would have been a proper point of instruction to the jury, to be by them compared with the evidence. But the evidence did not conduce to prove such assent and ratification by Hobbs.

Notice of the husband between the engagement and marriage, of the conveyance of the wife's estate, in fraud of his marital rights, does not help the conveyance, nor affect his right.

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Walter Blandford stated, that in 1808, when himself and Hobbs were at law about the slave, he asserting the validity of the bill of sale, and Hobbs charging it to be fraudulent, Hobbs acknowledged, that his wife's mother had told him there was such a paper, but he did not believe it. This confession must be taken all together; it does not conduce to prove, *per se*, an assent to, or ratification of, what had been done; on the contrary, Hobbs was then contesting its validity. This declaration of Hobbs amounts to no more than that he had heard of such paper before his marriage, not that he had been consulted about its execution, or that he had assented to it, or agreed to be bound by it; his words signify directly the reverse of assent and ratification. So that the question comes to this, did the notice of the execution of this paper, so had and contrived, connected with his after marriage, amount in law to a ratification of the act by Hobbs? Clearly not. Hobbs had, before the act done, contracted himself in marriage with Mary Blandford. If, by reason of the notice given him of that paper, by the mother of his intended wife, he had broken the marriage contract, then the main object and design of the fraud on the part of Walter Blandford, which the evidence conducted to shew, would have been accomplished. Hobb's marriage, was not superinduced by the bill of sale, but by virtue of his pre-contract of marriage. In executing the pre-contract of marriage, between himself and Mary Blandford, he did not assent to or ratify the act of Walter Blandford, in taking the bill of sale in fraud of his pre-contract.

Husband's
ratification of
the convey-
ance would
bar his claim;
but that can-
not be infer-
ed from the
single fact of
notice.

Between the bill of sale and the after marriage, there is no such necessary connexion, as that Hobbs must be presumed in law to have assented to it, barely because he had notice of it. Hobbs' rights had their inception by virtue of the contract of marriage; by the consummation of the marriage contract, his incipient rights were so far consummated, as that he might use all legal means to repel any aggressions upon those incipient rights. Had he refused to marry, after being informed of the bill of sale, because of it, then indeed he would have made it valid and binding. Had he broken off the marriage

agreement, and attempted to defend his conduct because of that bill of sale, then he would have affirmed that he meant to be bound by it, and had squared his conduct in obedience to it. By his marriage, he placed himself in an attitude to deny the validity of the bill of sale, and to resist its effects upon his rights. The instruction of the court, as given, by turning the cause upon the fact of notice, or no notice, has deduced a confirmation and ratification of the bill of sale, from the notice and after marriage of Hobbs, as an inference of law. The law does not warrant such inference.

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The decision on these points renders any decision upon the other points unnecessary.

It is the opinion of this court, that the circuit court erred in the instruction given to the jury, as stated in the bill of exceptions. Judgment reversed with costs, and case remanded for a *venire facias de novo*.

Chas. Wickliffe for plaintiff; *Chapeze* for defendant.

Madeiras vs. Catlett.

CHANCERY.

Error to the Fayette Circuit; JESSE BLEDSOE, Judge.

Case 106.

Mortgages. Liens. Cross bills pro confesso. Parties in chancery. Assignor and Assignee.

Chief Justice BIZZ delivered the Opinion of the Court.

July 1.

IN July, 1821, G. and J. Madeira exhibited their bill against Bradford, to foreclose Bradford's equity of redemption to mortgaged premises. Part of the estate mortgaged was claimed by Catlett, under a prior lien from Bradford; but Catlett was not made a party to the bill by G. and J. Madeira. In the progress of that case, an order was made upon Thomas Catlett, who was in possession of part of the land, to shew cause why a receiver should not be appointed to receive the rents to await the decision of the cause. Yet Catlett was not made party, nor does it appear that the rule was ever served on Catlett; the complainant proceeded to a decree against Bradford.

Case of the
Madeiras a-
gainst Brad-
ford.

MADEIRAS
vs.
CATLETT.

Catlett's bill
against Brad-
ford, Madei-
ras, and oth-
ers.

Catlett then exhibited his bill against Bradford, Madeiras, and others, claiming 58 acres, part of the 63 acres, mentioned in Bradford's deed of trust, for the benefit of Madeiras. Catlett exhibits the assignment of Bradford, of the 28th February, 1819, of 58 acres of land, part of 63 acres, which Craigmiles had bound himself to convey to Clinton, and which by assignment came to Bradford; he having before his assignment to Catlett sold five acres of the 63 acres to Todd. Upon Catlett's bill, and exhibition of the assignment of Craigmiles' bond to him, by Bradford, he obtained an injunction against the proceeding as to this land, upon the claim of Madeiras, until the matters could be heard.

Madeiras answered Catlett's bill contesting his priority of lien.

Madeiras' cross bill.

In the progress of this cause, Madeiras pray that their answer may be taken as a cross bill, and Bradford's heirs, Craigmiles, &c. are prayed to be made defendants, and upon this their answer, in nature of a cross bill, various proceedings were had.

Hearing.

The bill of Catlett, and the cross bill, as it is called, of Madeiras, were heard together.

Motion for cross bill to be taken for confessed.

Madeiras moved the courts to take their cross bill as confessed by Catlett, because he had put in no answer; this the court refused.

Decree.

The decree settled the principle, that Catlett's lien was prior to that of Madeiras, as to the 58 acres; that the land be sold by a commissioner, to raise the money due to Catlett; and it appears, that by consent, the rents during Catlett's possession, were set-off against the interest; the residue, after satisfying Catlett's demand, to be applied to the demand of Madeiras. From this decree Madeiras appealed by consent.

In a bill to foreclose, all persons interested in the mortgaged premises should be made parties.

No principle is better settled, than that in a bill to foreclose, all persons interested in the mortgaged premises should be made parties. It was very irregular to proceed in the first cause against Bradford alone, when, as it very clearly appears, Catlett was in possession under his claim. Catlett should have been made a party to the bill first exhibited by Ma-

deiras; their irregularity in omitting him, drove Catlett to his bill to protect his interest.

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The court very properly refused to take the cross bill of Madeiras as confessed by Catlett, for want of answer. He was not named as a party; no interrogatories were put to him in that answer, which is called a cross bill; no process issued against Catlett to require him to answer; there was nothing in the case to notify Catlett that an answer was required from him.

Cross bill cannot be taken for confessed against one of the original complainants not named as a party to the cross bill.

The court correctly preferred the equity of Catlett, to that of Madeiras; Catlett's commenced by assignment, by Bradford, of the bond of Craigmiles, held by Bradford, dated in February, 1819; Madeiras' equity commenced by the deed of trust of September, of that year; there is nothing to impeach the equity of Catlett. The claims of Catlett and of Madeiras are each but equities; the legal title to the land is in Craigmiles; and Catlett's equity, being prior in time, is to be preferred in equity.

Assignee of a bond for land and mortgagee of the assignor have each but equities, and the prior shall prevail.

But there is a want of proper parties. The bond of Craigmiles was executed to Archibald Clinton; the assignment to Bradford is by "Moses Clinton, administrator of Jacob Clinton, deceased, who was executor of Archibald Clinton, deceased, and heir by said Clinton's will." This assignment, as stated, does not, upon its face, transfer the legal property in the bond; for whether the said Jacob Clinton was heir or devisee of Archibald Clinton, yet taking this suit against Craigmiles, the co-defendant, as a bill for specific execution, the heir and administrator of Jacob Clinton ought to be parties; and moreover, the fact should appear, that Jacob Clinton was heir or devisee of Archibald Clinton. Craigmiles, in conveying under a decree of the court, ought to be protected against the future claim of those deriving title under Archibald Clinton. In this respect, the assignment of error by the appellants, is well made; the decree must be reversed for this cause.

Bill by the assignee of one styling himself the adm'r of the heir, executor, and devisee of the obligee, the representatives of the obligee are necessary parties.

And as the case is to go back for further proceedings, it is proper to remark, that the administrator or executor of Bradford, as also his heirs, and also

Other necessary parties.

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the assignee Todd, ought to be brought regularly before the court.

Mandate.

It seems to this court that there is error in this, that the proper parties were not before the court. It is therefore decreed and ordered, that the said decree of the circuit court be reversed, and that the case be remanded for further proceeding, by amending the bill of Catlett, to make the necessary parties, and by taking process to bring the proper parties before the court; and for such other proceedings as are consistent with the principles and usages of equity; and it is further ordered and decreed, that the appellee, Catlett, pay to the appellants their costs in this behalf expended.

Combs for plaintiffs; *Chinn* for defendant.

CHANCERY.

Yoder &c. vs. Atterburn; same vs. Standiford; same vs. Massie, and Atterburn vs. Yoder &c.; Standiford vs. same, and Massie vs. same. Six cases.

Case 107.

Cross writs of error to the Jefferson circuit; J. P. OLDHAM, Judge. *Mortgages. Practice in chancery. Fraudulent conveyances as to creditors. Sheriff's sales. Badges of fraud. Evidence. Errors. Dissents. Priority between creditors.*

July 1.

Judge MILLS delivered the Opinion of the Court.

Judgments, executions, and levy, on the estate of E. Standiford.

THOMAS PHILIPS obtained four judgments and executions, against Elisha Standiford; and Samuel Churchill obtained two against the same person. These six executions were all in the hands of the sheriff at the same time, and were levied by him, on one tract of 1500 acres of land, also another tract of about 300 acres, being the mansion farm of said Standiford, also a third tract of fifty acres, a fourth tract of 108 acres, ten slaves, four feather beds and furniture, a wagon and team of five horses with their harness, three other riding horses, forty head of cattle, fifty sheep, fifty hogs, one press,

one secretary, one desk, three tables, and a clock; all of the estate of said Standiford, and given up by him to satisfy said executions, which were all endorsed, that paper of the bank of the commonwealth would be accepted in payment.

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vs.
STANDIFORD
&c.

The estate was sold on the 15th June, 1823, for the sum of 3,708 dollars, and Jacob Yoder became the purchaser, and all was conveyed to him by the sheriff in one inclusive deed, which was acknowledged and recorded on the 7th of November, 1823.

Sheriff's sale; and conveyance to Yoder; and property left in debtor's possession.

The estate all remained in the possession of the debtor, and was not removed.

On the 13th of July, 1824, David Standiford, another creditor, who also had a judgment and execution, and in the month of September following, Henry Massie, and Harrison Atterburn, who were also creditors by judgment and execution, each filed their separate bills in equity, charging that this sale and purchase of the property by Yoder, were made with intent to delay, hinder, and defraud creditors, and to the great sacrifice of the estate, which was of far greater value; and that it was designed to save the estate for the benefit of Standiford, and was therefore fraudulent and void; and praying that the said sale might be set aside, and the estate be again exposed to sale, in discharge of their respective demands.

Bill of D. Standiford, and of Massie and Atterburn, other creditors, alleging the sheriff's sale fraudulent, and praying the estate to be subject to their judgments.

Yoder, and Elisha Standiford, answered each bill, and contested the fraud, and contended that the sale was fair and *bona fide*.

Answers.

The cases were ordered to be tried together.

The court below decreed, that the estate should be re-sold, under the direction of the court, by commissioners; and that Yoder should have the preference in having his claim satisfied; that is, the price which he gave for the property at the sheriff's sale; and that each of the others should follow in succession, giving the preference to the one which had his execution first endorsed by the sheriff.

Decree of the circuit court.

To reverse these three decrees, Yoder and E. Standiford have prosecuted their three writs of error.

Yoder and E. Standiford's writ of error.

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Atterburn's,
D. Standiford's and
Massie's
writs of error.
Ground of
complaint by
Yoder and
E. Standiford
against the
decree.

Grounds relied on by D. Standiford, Massie, and Atterburn.

Fair purchaser, at sheriff's sale, under a contract with the defendant that he may redeem, holds as in mortgage, and another creditor may maintain his bill to redeem, or have a sale and appropriation of the proceeds.

And the three creditors, David Standiford, Massie, and Atterburn, have each prosecuted their several writs of error, against Yoder and E. Standiford. All these cases have been heard together in this court.

1. Yoder, and E. Standiford now contend that the sale was fair, and not made to defraud creditors, in any way; and that, therefore, the decree selling the estate is erroneous.

2. That if a sale is to take place on any terms, it ought not to be made by a commissioner or master in chancery, under the direction of the court; but that all the chancellor could do, would be to remove the incumbrance on the estate, and let loose the executions at law.

On the contrary, D. Standiford, Massie, and Atterburn, contend that the sale, and deed made by the sheriff, in pursuance thereof, is fraudulent, and ought to have been held for nought, and that the court erred in settling the question of precedence between the parties; and that Yoder ought to be postponed to the whole.

The most favorable light in which this transaction between Yoder and E. Standiford, whereby the title through the sale by the sheriff was acquired in all E. Standiford's property, can be viewed, is to construe it into a mortgage. For however fair the sale might have been, it is in proof that by previous arrangement E. Standiford was to be allowed to redeem the estate, and a writing shewn by the defendants themselves, entered into after the sale, which will be hereafter more particularly noticed, also proves that E. Standiford was to be allowed to redeem or take the estate again at the end of four years. If then the arrangement is construed into a mortgage, it was competent for creditors by judgment and execution, to bring their bill to be let in to redeem or to compel the mortgagee to foreclose; or that the estate should be sold and the proceeds be applied, first to extinguish the claim of the mortgagee, and the residue to go to the creditors so suing. Indeed the decree rendered by the court below,

goes no further in its operation than a decree of this character. The title of Yoder is ordered to stand as an indemnity in his favor; or rather, he has the preference given him, in the distribution of the proceeds of the sale, for all the money which he had actually expended in making the purchase.

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&c.

We will not detain to discuss the question of power in the chancellor to set up this estate at auction, under his own order, and in the hands of his own officer. For we deny that his power, when he has fair possession of a subject, stops short of complete justice, and that he is bound to drop the subject just at the very point of relief, and call to his aid the process or functionaries of a court of common law, to help him out of the dilemma. On the contrary, he can generally complete what he begins, and particularly if a sale is necessary for the ends of justice, he will direct and superintend it. To a sale thus directed, under his immediate direction, and subject to his immediate revision, there is generally, and ought to be, greater confidence given, than is to those of a court of common law, which are conducted by ministerial officers only, and afterwards do not receive judicial confirmation or approbation on the hearing of the parties, unless one of them shall move to set it aside.

Where the chancellor sets aside a fraudulent conveyance, on the complaint of a judgment creditor, he ought to order the sale, and have it effected, and not turn the party back to his common law execution.

The main question, therefore, in this cause, must be, is this title acquired by Yoder, fraudulent, and made with intent to delay, hinder, and defraud creditors?

Main question stated.

The following is a summary of the facts relied upon by the creditors now contesting it.

Facts relied on to prove the sheriff's sale fraudulent.

At the time the sale was made, E. Standiford was much indebted, not only to those creditors whose executions had actually seized, and were about to sell the property, but there was another train in their rear, well known to both himself and Yoder. Indeed, at least one of those creditors, who now attack this sale, had his execution in the sheriff's hands at the sale, but not in time to act its part with those which sold the estate, and the others were pressing on to judgment.

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&c.

Yoder lived in another county, and was an intimate friend of the family of the wife of E. Standiford, and was known to have the means to relieve the distresses of E. Standiford. Two or three days before the sale, E. Standiford paid him a visit, to get money from him, or to make some arrangements to save the estate. Yoder, according to his own account of the matter, would not furnish the money, but agreed to let the estate be sold, and to become the purchaser with the avowed design of favoring Standiford, or his family, supposing, that when he got the estate in this way, all conveyed to him, it would be more secure.

To effectuate this object, Yoder came to the neighborhood a day or two before the sale, and purchased up at least two of the executions, and thus got the control of them.

On the day of sale, Yoder, as well as E. Standiford, and his connexions, persuaded the creditors not to bid, assuring them that their money was secure, and their debts would be paid.

Account of
the sales.

On the day of sale, by the procurement of both Yoder and E. Standiford, the estate was put up in large lots, so as to compel purchasers to take all or none. For instance, three tracts of land, 1500, 50, and 108 acres, were together sold for \$2,100; desk and book case at one dollar and fifty cents; a settee and a dozen of chairs at one dollar; four beds and bedding at \$4; three slaves in one lot, \$201; a negro woman and three children, \$401; wagon and five horses, with their harness, \$151; forty head of cattle, at \$165; of the hogs and sheep, there is no account. But it is remarkable, that these lots were so managed as to amount with great precision to \$3,708, the exact amount of all the executions then operating on the estate.

Property left
in defendant's
possession.

Not an atom of the estate was removed, or taken into the possession or use of Yoder, but all remained in E. Standiford's possession, as before. The intention was thus effectuated, and E. Standiford was favored and benefited by continuing the use and results of the estate.

On what terms E. Standiford was to retain it, we are not told, except in the answers of Yoder and E. Standiford. They exhibit a writing, or lease of the estate, between themselves, dated on the day of sale. It purports to lease the whole to E. Standiford and his brother-in-law, Joseph A. Brooks, from the first of July, 1824, to the end of three years; the lease to be forfeited if the rent was not paid annually, and Yoder to have the right to enter and dispossess the tenants for a failure; also, reserving to himself the right at all times to withdraw any of the slaves or personal estate, on making a proportionate deduction, or compensation, or substituting others in their place. The tenants, or lessees, are to keep the premises in good repair; to pay taxes and physicians bills; to feed and nourish the slaves and their increase; to keep up the stock of cattle and horses; to commit no waste, and to surrender the possession in good order and repair, natural wear excepted; yielding and paying as hire and rent \$275, in gold or silver per annum. Yoder agrees to accept the sum of \$207 85, in gold or silver, and 90 bushels of salt, annually, in lieu of the \$275, at the election of the tenants. Then this stipulation follows:

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vs.
STANDIFORD
&c.

Agreement
between pur-
chaser and
defendant, as
to the dispo-
sition of the
property.

“Said Yoder, in consideration of esteem for said Joseph A. Brooks, and Nancy Standiford, wife of Elisha Standiford, who are children of his old friends, Joseph Brooks and Nancy his wife, agrees further, that if the said Joseph A. Brooks and Elisha Standiford or the survivor of them or their legal representatives, shall wish to purchase the property at the end of the lease, and shall tender and pay unto him or his legal representatives \$3,500 in gold or silver, between the 31st day of May, 1827, and the 1st of July, 1827, and shall have paid up all taxes, debts, dues, and demands, that shall have accrued against said Yoder, by cause of his owning said possession, so as to save him harmless from all liability; and to give him the consignment of the said \$3,500 aforesaid, free from all deductions and draw back, then the said Yoder shall sell the said property now leased or what shall be of said property, either by decrease or increase, unto them the said E. Standi-

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&C.

ford and Brooks, or the survivor of them, or their legal representatives, and will convey the same, by deed of quit claim, with special warranty only, at their expense. But the said Yoder does not bind himself to convey in case of tender and payment, except only during the month of June 1827, and will not sell and convey after the 30th of June, 1827."

Evidence insufficient of the agreement between defendant and purchaser exhibited in their answers.

This writing appears to have been signed by Yoder and E. Standiford alone. Brooks has not signed it. There is no proof when it was executed, or that it was executed at all. There is one subscribing witness, whose testimony is not taken. Whether it really existed from its date, or is manufactured to suit this cause, does not appear, except by the answer of the defendants, one of whom admits its execution after its date.

It is further remarkable, that there is no provision in it for the rent of the first year after the sale. Thus long, E. Standiford seems to have been entitled to the premises rent free. The defendant, Yoder, however, in his answer, says that the rent of that year was omitted by mistake.

Manner of the payment to the sheriff of the purchase money, & the source whence it came.

The mode in which the price at the sale was paid, must not be omitted. Yoder receipted to the sheriff for the two executions, of which he had the control. He gave his sale bond, with Joseph A. Brooks security, to another creditor, for \$418. This bond, when it became due, was paid and discharged by the debtor, E. Standiford. Yoder also paid to the sheriff, on the day of sale, \$2,513, in notes on the bank of the commonwealth, or rather, this money was advanced on the day of sale, by Joseph A. Brooks, the brother-in-law, and was counted by Solomon Neill, another brother-in-law of Standiford, and passed by him directly to the sheriff, without going through the hands of Yoder. The mode in which this is accounted for by the defendants, Yoder and E. Standiford, is this. Joseph Brooks, the ancient friend of Yoder, alluded to in the lease, was indebted to Yoder at his death, about this sum, the payment of which he imposed by his will on his son, Joseph A. Brooks, and the will of Joseph Brooks, produced, thus far verifies this

statement. It is alleged by Yoder, that this sum Joseph A. Brooks secured to him, by his own bond, and that the money, on the day of sale, was paid by Joseph A. Brooks to the sheriff for Yoder, in discharge of this debt. Such was the color given to the transaction on the day of sale. But no bond from Joseph A. Brooks to Yoder was produced, or surrendered; nor is any shown in the cause, nor does it appear that he is released from this debt. He produced the paper on the bank of the commonwealth, to the nominal amount of this debt in-specie, ostensibly for the purpose of paying this debt. Another of the family counted and gave it to the sheriff, and Yoder seems in this transaction to have been passive; so that a suspicion may be excited, that this was a family arrangement to save the estate of E. Standiford, in the name of Yoder.

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&c.

Such are some of the prominent facts, relied on by the complainant below, to vitiate this sale, and we cannot help concluding from them, that this sale is fraudulent and void.

If it be admitted, that Yoder really paid down and secured a valuable consideration for this estate, it is not enough to enable the arrangement to escape the effects of the statute. Every such arrangement must be not only founded on a "good," which is construed to mean a *valuable* consideration; but it must also be "*bona fide*." If it wants the latter requisite, it is as clearly fraudulent as if it wanted the former also.

Sales, to be valid against creditors, must be not only for a valuable consideration, but *bona fide*.

It is true, that this sale was effectuated in satisfaction of real debts, and in the fraud the creditors seem not to have participated, but only remained passive. Their object was to get their money without concurring with any arrangements between the debtor and the purchaser. It may therefore be urged, that Yoder is clothed with the rights of those creditors, and that the sale is clothed with the sanctions of the law and therefore it cannot be attacked as fraudulent.

Purchaser under the executions of *bona fide* creditors, is not protected by their merit in his purchase he makes in combination with the debtor, to hinder, delay or defraud other creditors.

The act to prevent frauds and perjuries was designed to leave property naked to the free course of

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the law, and to keep impediments out of the road of honest creditors. It was foreseen by the legislature, that these provisions against fraud, might be made the shelter of fraud; and that a debtor knowing that the cause of the creditor and the means afforded him for the recovery of debt were held sacred, might, and probably would, endeavor to take protection under it, and to surround himself with the formalities of law and the rights of the creditor, and thus be placed in a fortification impregnable. To guard against this, and to prevent the law, made to prevent frauds, becoming the shield of fraud, the legislature expressly extended the provisions of the statute to every judgment, or execution, as well as every other mode of transfer, if it was not *bona fide*. We need not then talk of legal solemnities as a shield, if they were acquired or applied with intent to injure creditors; nor need we bring up the rights of creditors, acquired by Yoder, if they have been used by him to fix this estate of E. Standiford beyond the reach of other creditors, while the debtor should enjoy it securely. Certainly, it never could have been intended, that the advantages and preference obtained, even by an honest creditor, should be used as an obstacle to others, by so fixing it to the estate as to become a perpetual shield. If, therefore, the debts which sold this estate were honest, and the preference acquired by these creditors, in their fair and honest pursuit of their debts, has been used by the present owner thereof, to secure the estate to the debtor secure from another host of creditors, yet in the rear, but in ardent and legal pursuit, he must be stripped of the advantage, and stand as any other fraudulent grantee. For neither the words of the statute, or principles of equity, recognize any distinction in his favor.

Facts which
are badges
and evidences
of fraudulent
sales—

The different facts on which the complainants rely to prove fraud in this sale and conveyance, are such as have ever been held by all chancellors, and courts of common law, as badges and evidences of fraud.

—Contrivances to protect

The previous arrangement proves, that something more was intended than barely relieving the pres-

sure of debt then pressing upon E. Standiford. That was not the only easement intended. Security against a future group of creditors was designed. If present relief was the object, advancing the money on loan, secured by mortgage, would have done it. In this arrangement, he was to favor the debtor. How was this to be done? By bidding off the estate and acquiring a title in legal form, and the favor was to consist in permitting the debtor still to enjoy, and in keeping off the hands of the remaining creditors.

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the estate a-
gainst other
creditors.

To effectuate this object, every arrangement was to be made, by setting up the estate *en masse*, so that it was exactly to extinguish the active executions and no more, and yet be acquired at an enormous sacrifice, as the proof in the cause abundantly shews. Another circumstance not hitherto noticed, is calculated, to induce this belief. Atterburn, one of the present complainants, was present, and his execution was endorsed. On its being suggested, that by bidding, the estate might extend far enough to cover his debt, he bid for one of the slaves, and the mother-in-law of E. Standiford appeared against him as a competitor in bidding, and spoke with some warmth to him for attempting to bid. His ardour was damped, by this competition with the mother of the wife of the sinking debtor. The slave was stricken off to Mrs. Brooks, but was afterwards placed among the purchases of Yoder, and was gotten by him, through her instrumentality.

Sale conducted so as to avoid competition, and prevent the estate selling for its value.

But if there was no other circumstance, the possession of this estate, being all the debtor owned, remaining with the debtor, is one which cannot be overlooked. This possession, even according to the lease produced, was to be gratis for one year, and the debtor was, during that time at least, the absolute possessor, and Yoder on record the absolute owner. This is strong evidence to shew the previous arrangement, or secret understanding, that the beneficial interest in the property was still to be E. Standiford's. We well know that this is not the mode in which men, ordinarily prudent, manage their money. They do not usually lay out their money to

Possession of property purchased at sheriff's sale, remaining with the debtor, is evidence of an arrangement in fraud of creditors.

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purchase estates, to be enjoyed by others without affording to them the least return on the capital; and some extraordinary reason must exist for such an occurrence. Indeed, seeing a person in possession of an estate, enjoying all its benefits, when it is mortgaged, and the condition of the mortgage, long forfeited, and the mortgagee lying supinely by, not wishing to enjoy or use his money, and many creditors of the mortgagor remaining unpaid, does create in the mind of every one, a suspicion, that it is a secret arrangement to secure the mortgagor against disturbance from creditors. The weight of such a circumstance, is sufficient to repel the presumption of fairness; and to induce a belief of a secret and unexplained understanding between the parties. Indeed, possession in the grantor, while title is in the grantee of an absolute conveyance, has been often held, by the settled law of this court, to be conclusive evidence of fraud.

Effect of the
mortgagor re-
maining in
possession.

The same doctrine has been applied, by many of the American courts, as well as those of Great Britain, to mortgagees, even when it is stipulated on the face, that possession shall remain with the mortgagor, as is shewn by Mr Kent in his commentaries, vol. 2, p. 405, *et seq.*

But we need not enquire into the soundness of this doctrine, on principle. For if we admit the true doctrine to be, that in the case of a mortgage, possession of the mortgagee is consistent with the deed; at all events continuing that possession after the condition is forfeited, without disturbance from the mortgagor, is calculated to induce a belief, that the mortgage is one of an amicable character, to answer the particular purposes of the debtor, rather than a real security for the debt named on its face.

Secret ar-
rangement
between the
debtor and
the purchaser
of his estate
at sheriff's
sale, contriv-
ed to defraud

But the present case is not a mortgage. The right of redemption no where appeared on the face of the deed. That was a secret arrangement between the debtor and grantee. It is true, this was not a deed executed directly from the debtor to the grantee; on its face it shewed the forms, solemnities, and energies of the law, forcing the estate from the debtor, and fixing it in the grantee. But yet, if this was

done by a secret arrangement between the debtor and purchaser, clothed with forms, but not the substance of the law, in order that the debtor might enjoy while the grantor before the world had the absolute estate, it cannot substantially differ from an absolute deed executed by the debtor himself, and possession therefore must be high evidence of fraud.

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other creditors, shall not be construed a mortgage to give it effect.

Evidence of the fraudulent intent.

With this conclusion every attending circumstance concurs. The money is gotten from the family. They all concur in the arrangement, and the debtor afterwards discharges and satisfies the only sale bond which is given. The money paid, is ostensibly in discharge of a debt coming from a brother-in-law. His security is not surrendered, and no receipt is given. The money is carefully passed through the hands of another brother-in-law, now used as a witness, and conveyed by him safely to the sheriff, without being suffered to touch the hands of Yoder; and the estate is sacrificed for less than half its value, being the whole the debtor had, and he still in debt. Can it be believed that Yoder intended to make a speculation merely, and that he should afterwards forget to enjoy it? Can it be supposed that he was so generous as to pay such a sum, and lie out of the use of it for one year, without any remuneration, or with a bad prospect of rent or interest for three years more, and that to do a kind action to Standiford, without including in that kindness a protection against creditors? Is not the belief more plausible, that the arrangement was to secure the debtor in the estate under color of a sheriff's sale and that the lease now produced is an after-thought, framed to meet the demand of creditors? We conclude that it is, and that this sale and deed is within the letter, as well as the spirit of the act; they were made with intent to delay, hinder and defraud creditors, and are not *bona fide*.

It may be said, that this conclusion is severe, and against those fine feelings of the heart, displayed in an act of benevolence, and that Yoder ought to have been permitted to extend his kindness to his friend. Not so. The exercise of pure benevolence is not cramped by the conclusion; but only that which is

Benevolence exercised towards debtors, to protect their property from their just creditors, denounced.

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impure. The creditors of Standiford had a moral right to his estate, and if the benevolence of Yoder has been exercised with an eye to obstruct that right, his benevolence is converted into corrupt design, loses all its merit, and is not entitled to the name.

Judges Ows-
ley and Mills
concur as to
the proof of
the fraud,
chief justice
Bibb dissent-
ing.

Thus far there is a concurrence of opinion, in the majority of the court; while the chief justice conceives that there is no fraud established, and that the decree ought to be reversed at the prayer of Yoder, and all the bills dismissed.

But as to the consequences which must follow from the fraud, a difference of opinion between the two judges who agree in the existence of fraud, arises.

Judge Ows-
ley's opinion,
that though
Yoder's pur-
chase was
fraudulent,
he is entitled
to the prefer-
ence which
the owners of
the execu-
tions had,
which he
thereby satis-
fied.

Judge Owsley conceives, that although the conveyance, or title of Yoder, is fraudulent, yet, as he came in under creditors whose executions had a prior lien, and were clear of fraud, Yoder ought not, as a defendant in a court of equity, to be placed in a worse situation than the creditors were; that, stript of his own title, on account of the fraud, he must be left in possession of theirs; and therefore, while he is of opinion there ought to be no reversal at Yoder's instance, he also thinks that the decrees ought not to be reversed at the prayer of the creditors to grant them more, because the decrees have only left Yoder in possession of the rights of the creditors under whom he acquired the estate.

Judge Mills
opinion to
the contrary.

Judge Mills conceives, that if Yoder is guilty of a fraud, and if his title comes within the act to prevent frauds and perjuries, it is, according to the letter of the act, absolutely void, and can have no force for any purpose, and that no regard is to be paid to its inception, or the purity or impurity of the executions under which it arose; and that, consequently, Yoder ought to stand as a general creditor, and be allowed to come in only after the creditors, who have acquired a legal preference, are satisfied; and that for this purpose the decree, at the instance of the creditors, ought to be reversed.

Affirmance of
all the dec's

On this point, as the chief justice does not admit that the decrees against Yoder are correct, he will

not concur in the reversal, for the purpose of making Yoder's case more unfavorable. It follows, therefore, from this division of sentiment, that in all the writs of error there must be an affirmance. In those of Yoder, the chief justice dissenting, and in those of the creditors judge Mills dissenting.

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in consequence of different opinions among the judges.

We shall barely add, that as between the creditors themselves there can be no doubt that the disposition among themselves is right; that though equity generally prefers equality, and directs debts to be paid proportionably, yet the rule does not hold good, when a preference has been obtained at law. There equity follows the law, and leaves the advantage with him who has gained it, especially where the fraud is of a legal and not of an equitable character: Codwise vs. Gelston, 10 John. 507; Messonier vs. Gomperts, &c. 3 John. chy. rep. 3; M'Dermutt vs. Strong, 4 John. chy. rep. 687.

Judgment and executions creditors (or whom fraudulent conveyances are set aside, entitled to the preference in equity they had at law.

In all the cases the decrees are affirmed, with costs.

Dissent of Chief Justice BIBB to the opinion of the court on the evidence of the fraud alledged in the purchase at the sheriff's sale.

Six several executions were delivered to the sheriff of Jefferson county, on the 14th day of April, 1823, against the estate of Elisha Standiford, which were levied by the sheriff, on the 14th of May, on fifteen hundred acres of land, whereon Standiford lived, including half the salt water, including his farm, fifty acres sold by Breckenridge &c. to John Murphy and J. C. Beeler, and 108 acres, part of Edward Rice's claim; also on ten slaves; a waggon and horses, and harness, three riding horses, 40 head of cattle, 50 head of hogs, 50 head of sheep, and various articles of household furniture. The estate was advertised by the sheriff, and sold on the 14th June, 1823, amounting in the aggregate of the parcels sold, to the sum of three thousand, seven hundred and eight dollars, being the amount of the said six executions and sheriff's commissions. Of these executions, two, amounting to \$777 04, were for the use of James Guthrie who transferred them to Jacob Yoder; the other four, were in favor of Thomas Phillips.

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Jacob Yoder became the purchaser of the whole of the property; he gave receipts to the sheriff for the amount of the executions so assigned to him, paid down to the sheriff the sum of \$2,513, and executed his bond with security, payable at three months, to Thos. Phillips for \$418, according to law, which satisfied all those executions, with the sheriff's commissions, and they were so returned by the sheriff; all these executions were indorsed as receiveable in paper of the bank of the commonwealth.

At June term, 1822, Atterburn had judgment against Elisha Standiford, for \$663 debt, with interest from 7th March, 1822, till paid, besides costs. The last which issued on this judgment, in May, 1824, was returned, no property found.

At March term, 1824, David Standiford had judgment against Elisha Standiford, for \$838 debt, with interest from 9th March, 1820, till paid, beside costs. An execution on this judgment, bearing teste on the 14th March, 1824, (with the credit noted in the judgment, of \$125 90, paid 25th June, 1823,) was returned by the sheriff, no property found.

Henry Massie alleges, that he obtained judgment against Elisha Standiford for \$180, with interest from 26th Dec. 1822, and costs; and that a *feri facias* upon his judgment was returned by the sheriff, no property found; but this judgment and execution is not exhibited.

In July, 1824, David Standiford exhibited his bill against Yoder and Elisha Standiford; on the 20th September, 1824, Massie exhibited his bill against Yoder and Elisha Standiford; and on the 27th of September, 1824, Atterburn exhibited his bill against Yoder and Elisha Standiford; each creditor stating his judgment and execution returned, no property; referring to the sale by the sheriff on the 14th June, 1823, and the purchases by Yoder of the property, and to the sheriff's return thereof, and praying that the sale to Yoder might be decreed to be fraudulent and void, and that the property, or so much as may be necessary, may be sold, and the proceeds applied to satisfy his debt; and for such other relief as the case may require.

These suits were afterwards consolidated, the proofs in one to be read in each, and a joint decree on the three bills was rendered.

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The charges to impeach and invalidate the sale and sheriff's deed to Yoder, are: that E. Standiford "for the purpose of securing said property from, and of cheating and defrauding his other creditors, procured said Yoder to purchase the whole of said property, at the sale aforesaid, for the use and benefit of him, the said Elisha, as he did, for about the sum of \$3,708, in notes of the bank of the commonwealth, then not worth more than fifty cents in the dollar," when the property was worth about \$18,400.

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That to effectuate this, Yoder and said Elisha Standiford dissuaded other persons present from bidding against said Yoder; had the three tracts of land cried off in a single lot; three of the negroes in one lot, four in another, two in another; the wagon and five horses in another; the 40 head of cattle in another.

That the sum of \$2,513, in bank notes, which were paid down at the sale, were received by Yoder from said Elisha for that purpose.

That before and since the sale; Yoder had frequently declared that he made the purchase for the use and benefit of said Elisha; and that he only held the property until he was indemnified, and paid what was actually due him by said Elisha, which they charge to be short of eight hundred dollars; that in pursuance of said agreement, said Yoder has suffered the whole of the property to remain in possession of said Elisha, who continues to act over it as the visible owner and proprietor.

Yoder, by his answer, exhibits the deed of the sheriff to him for the property, sold at the prices stated in his return on the executions, viz: 1,500 acres of land on Pond Creek, including the farm and half the salt water, and 106 acres on Pond Creek, and 50 acres on Fern Creek, at \$2,100; desk and book case at one dollar fifty cents; secretary at two dollars fifty cents; table at fifty cents, one other ta-

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ble at fifty cents; settee at one dollar; one dozen chairs at one dollar; clock at one dollar; one press at one dollar; one table at fifty cents; four beds and bedding at four dollars, three negroes, Alice, Priscilla, and Robert, at \$201; Patience and her three children, at four hundred and one dollars; boy, Sam, at \$31; man, Leonard, \$253; Isaac at \$381; waggon and five horses, and harness, \$151; gray horse, ten dollars fifty cents; roan mare at one dollar; forty head of cattle at \$165; in all, \$3,708; which deed bears date on the day of the sale, and is duly admitted to record.

He states that he does not know the real value of the property, but that the value put on it by the bill is, in his belief, in every instance, greatly exceeding the truth; that he believed he was purchasing good bargains at the time; but no better than is usual at sheriff's sales; and that he had for competitors other bidders, particularly Thomas Philips, the plaintiff in four executions, and Harrison Atterburn, one of the complainants.

He denies that he dissuaded any one from bidding, or that he has any knowledge that Elisha Standiford did.

He denies that the purchase was made to defraud the creditors; he denies that he made the purchases, or any of them, for Standiford, or his use, but for himself as sole owner.

He admits he leased the property to E. Standiford, or to him and Joseph A. Brooks, for \$275, per year, in specie, for four years, with liberty to them, or the survivor of them, to purchase the property by paying him the sum of \$3,500 in gold or silver, between the 31st May, and 1st July, 1827, if they shall choose so to do; according to the writing by him exhibited, executed on the 14th June, 1823; but that they, nor either, were bound so to do.

He admits he has stated, that he would be satisfied with the payments stated in that agreement; and that he had given Standiford four years to pay the same; but he denies that he ever made any statements different from the said writing.

He denies that the \$2,513, paid to the sheriff, were paid to him by Standiford or any part thereof; but that he held the bond of Joseph Brooks, deceased, for twenty odd hundred dollars, who held the bond of Joseph A. Brooks for the like or a greater sum, and by his will directed the said Joseph A. Brooks to pay the sum due the said Yoder; this sum was due in specie; that Joseph A. Brooks gave his own bond and took up his father's bond. Shortly before the sale the said Yoder agreed with said Brooks, that in case he, Yoder, became the purchaser, and if he, Brooks, would pay the amount of said bond in bank notes, he would accept the same instead of specie, dollar for dollar, and when he did become the purchaser at the sale, the said Joseph A. Brooks did pay the said \$2,513, which he, said Yoder, accepted as so much paid on the bond, and delivered it to said Joseph, who was good and solvent; that he agreed to that arrangement, believing, that if he did purchase at the sale, he would procure property at terms sufficiently advantageous to indemnify him for the difference between Bank notes and specie.

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That he did procure from Guthrie an assignment of his executions, and did allow him therefor, specie, dollar for dollar; that the notes were at the time at 195 for 100.

That he has not permitted said Elisha to have any use or possession of the property, except as lessee, as aforesaid; and has not received any part of his money so paid for the property.

The answer of Standiford denies that the purchase by Yoder was procured by him to defraud his creditors.

He states, that before this sale, Thomas Phillips, under a prior sale by execution, had purchased twelve hundred acres of land belonging to said Elisha, at twenty dollars, and still insists on his purchase; and James Guthrie, another of the plaintiffs in said executions, had, at a previous sheriff's sale, purchased three hundred acres of his land, for forty dollars; and but for the bidding of Yoder, he be-

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believes that his estate would have been sacrificed in a manner utterly and hopelessly ruinous to said defendant, Elisha; and his said creditors would have been left unpaid; that to prevent the ruinous sacrifices, like those formerly experienced by him, he did apply to Yoder to become a bidder; and afterwards procured the lease stated in Yoder's answer, with liberty to buy the property, if he could, on the terms therein stated; the respondent flattering himself with a hope that he could in that time be enabled to pay Yoder, and thereby also satisfy his other creditors.

He denies that Standiford furnished the whole, or any part of the said sum of \$2,513, paid by Yoder on the day of sale.

He denies that said sale was to the injury of his creditors, or with intent to cheat or defraud them; but on the contrary, he then believed, and yet believes, that the arrangement with Yoder was the best in his power for his creditors or himself, and without it that he would have been ruined, without the possibility of paying his debts; he has paid no part of the said amount to Yoder.

Upon hearing, the circuit court decreed, that the said property so purchased by Yoder should be delivered to the commissioner appointed by the court, to be by him sold, or so much, as necessary; first, at three month's credit, for notes of the bank of the commonwealth, to satisfy Yoder the sum of \$2,690, with interest at six per cent from the 28th June, 1826, till paid, including also the sum of \$40, allowed the commissioners for making the sale; the residue on a credit of two years, to satisfy the complainants, unless they will endorse to take bank notes of the commonwealth; in that case the sale to be at three months credit. The land purchased by Guthrie formerly, and sold by him to Yoder, not to be included in the sale, but to be retained by Yoder, and the said 1,500 acres to be laid off so as not to include said Guthrie's purchase of 300 acres.

The creditors of Standiford complain of this decree, that they have been postponed to Yoder.

Yoder complains, that his demand has been reduc-

ed in the amount; and that such reduced sum is to be paid in paper, instead of coin; with various other objections to the details, and to the decree, in avoiding his purchase.

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As to the value of the property, stated by the bill to have been purchased by Yoder, the evidence furnishes no data from which the aggregate value can be computed. But the value set down in the bill is evidently the exaggerated suggestion of the attorney, like the allegations in declarations of trespass for cutting ten thousand oaks, and four hundred firs, and one thousand beeches, and five thousand ashes, &c. of the value of \$20,000; in which the attorney makes sure to state more than he expects to be proved, so as to let in his client to prove as much as he can.

The value of the land cannot be ascertained; the complainants have taken the deposition of Thomas Phillips, the plaintiff in four of the executions, who states, that of the 1,500 acres, some of it was worth from four to six dollars per acre, in specie, but how much he cannot say; but the greater part was of such inferior quality, that the witness would hardly pay the taxes for it; that for the 108 acres, Elisha Standiford gave ten dollars per acre, but he does not believe it was at the sale worth half that much; the 50 acres he thinks "worth more than any of it; it is worth from four to six dollars specie per acre." Two or three of the negro men, he thought worth \$400 in specie, each; the value of the women and children he does not know. The cattle he thought worth six or seven dollars specie per head; the wagon and horses and gear he supposes worth \$500 or \$600 in specie. He can not say what the land purchased by Yoder was worth; at two former sales, under his executions, he bought about twelve hundred acres, adjoining that purchased by Yoder, for about twenty dollars commonwealth's paper, part of the same tract.

By the deposition of Mr. Guthrie, it appears, that he had, under an execution, purchased at sheriff's sale, three hundred acres, part of the tract on which Standiford lived, for forty, or forty odd, dollars; this

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was the amount of the smallest of three executions he had. He then sued out his other two executions again, which were the two under which Yoder purchased. These 300 acres he believes worth from two to three dollars per acre, in specie; and understands they are included in Yoder's lease to Standiford.

Mr. Phillips farther states, that, the night next but one before the sale of Standiford's property, Yoder staid all night with Phillips; and told him that said Standiford and Squire Brooks, the brother-in-law of Standiford, had gone to his, (Yoder's) house, and brought him down from another county to attend the sale; "that through their persuasion, and in order to favor Standiford, he was going to purchase the property; and that Standiford (as near as he recollects,) was to have four or five or six years to redeem it in."

When the sale commenced, he, Phillips, commenced bidding, to make the property come to the amount of his executions; Yoder complained of him, and requested him to desist. Upon cross interrogation, by defendant, Phillips explains this, and says, that Yoder did nothing but to tell me, Phillips, "not to bid; that I had run the property up high on him; that I should have my money." That Standiford and Joseph Brooks also importuned him not to bid, before and during the sale. He also acknowledges, that before the sale, he Phillips endeavored to persuade Yoder not to bid at the sale, his reason for persuading Yoder not to attend the sale, was, because "I had made an arrangement with old Mrs. Brooks to secure me my money in two, three, and four years, and to give her the benefit of using my execution, and I expected, that if Mr Yoder attended at the sale that arrangement would not be made;" "that arrangement with Mrs. Brooks, was made in presence of Standiford."

Phillips, in his second deposition, states, that about the time the sale bond given by Yoder became due, Standiford paid him the amount in the clerk's office, and he gave a receipt in full against the bond, but he does not know whose funds Standiford paid with; Yoder is not in the habit of travelling about much.

Francis Smith states, that on Monday before the sale, Standiford left home and returned on Wednesday, with Yoder; from conversations in the family, he understood that Standiford had gone for the said Yoder for the purpose of making some arrangement to save his property; and in a conversation with Yoder, he observed, "that he supposed he would have to assist these people, meaning Standiford. From the conversation I had with Yoder, I understood that he, the said Yoder, was to become the purchaser of the property of said Standiford, and let it remain in his hands for some time, for the purpose of enabling him to redeem it at some future period."

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Phillips states, that he advised the complainant, Atterburn, to bid, that there was property enough to pay his execution, which was then in the sheriff's hands; Atterburn said he would bid for the negroes; and it appears, from the deposition of Mr. Buckner, that Atterburn did bid for one of the negroes; Mrs. Brooks overbid him, and said she would have the negro if it cost her a thousand dollars; Atterburn bid no more.

It appears, from the deposition of Mr. James Guthrie, that he, having two of the six executions, attended the sale; Phillips' executions, amounting to near three thousand dollars, were first to be satisfied; Guthrie, not having money to pay Phillips' prior executions, and not wanting property, was apprehensive that without becoming a purchaser of property he did not want, he might lose his debts; in that situation, before the sale commenced, he transferred his executions to Yoder; also the benefit of his former purchase of the 300 acres of land, which he had bought under another execution. Yoder gave him the amount he bought the land for, also the amount of a note he held on Standiford for eighty or eighty five dollars, in specie, not included in the executions, and also the amount of his executions; and therefor Yoder executed his bond with Joseph A. Brooks, his surety, payable in three months, which was paid afterwards by Yoder, in specie, amounting to \$944 50. Before the sale com-

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menced, Guthrie endorsed his executions for the benefit of Yoder.

Yoder declared, during the sale, he did not care about Standiford, but he disliked to see the children of his old friend Brooks suffer, and that if any thing could be saved out of the property, after paying the money he advanced for the property, in specie, he meant to let them have it.

It appears, from the deposition of Thomas Phillips, Squire Brooks, and Solomon Neil, and the will of Joseph Brooks, that Joseph Brooks owed Yoder a debt, which amounted to \$2,512 50, in specie. This debt, Yoder, before the sale, agreed to take from Joseph A. Brooks, the son and devisee of Joseph Brooks, (who by the will was directed to pay this debt) in paper, provided he, Yoder, became purchaser to that amount, and provided Joseph A. Brooks would pay the paper on the day of sale, the sales being for paper of the Bank of the Commonwealth, then at a depreciation of two for one: when Yoder became purchaser, Brooks did pay the money to the sheriff, for Yoder, who surrendered the bond he held on Brooks.

By the depositions of Thomas Phillips, James Guthrie, Solomon Neil, Squire Brooks, and Thomas Buckner, who were attending, it appears that the sale was conducted fairly and properly by the sheriff; nor is there any colour of evidence, that the sheriff was in any manner controlled or influenced in conducting the sale, by the advices, desires or solicitations of Yoder or Standiford, or by any thing other than his own sense of duty.

It appears, that Mrs. Standiford, wife of Elisha Standiford, the defendant in the executions, was the daughter of Joseph Brooks, deceased; she was the sister of Joseph A. Brooks, and the sister-in-law of Solomon Neil, he having married a daughter of Joseph Brooks; Yoder was an old and intimate friend of Joseph Brooks, the father of Mrs. Standiford.

It appears, from the deposition of Mr. Guthrie, in answer to an interrogatory put to him by the complainants, that he did not believe that Solomon Neil had the means to prevent Standiford's property

from being sold; he believed that Joseph A. Brooks had the means, but for reasons stated at the time, was not disposed to aid Standiford, or purchase his property, but that Neil and Brooks appeared anxious that Yoder should become the purchaser.

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The lease from Yoder to Standiford bears date on the 14th June, 1823, and is for four years; it is prepared as a lease to Standiford and Joseph A. Brooks, but it is not signed by Brooks. By the terms of the lease, Yoder reserves the complete dominion over the slaves and personal property; he is at liberty to take into his possession, at any time, all, or any of the slaves or articles of personal property, by substituting others, or by allowing reasonable deduction from the rents, or making reasonable compensation, he reserves a rent of \$275 in specie clear of all taxes, doctors' bills and expenses; the lessee not to commit waste, but to preserve, nourish, and keep in good order, the negroes and stock, and demised premises, with liberty, however, to the tenant to pay \$207 85 in gold or silver, and ninety bushels of salt, delivered at Manslick, in lieu of the rent of \$275. Yoder, "in consideration of esteem for said Joseph A. Brooks, and Nancy Standiford, wife of Elisha Standiford, who are children of his old friends, old Joseph Brooks, and Nancy his wife, agrees further, that if the said Joseph A. Brooks and Elisha Standiford, or the survivor of them, or their legal representatives, shall wish to purchase the property at the end of the lease, and shall tender and pay unto him, or his legal representatives, \$3,500 in gold and silver coin, between the 31st day of May, 1827, and the first day of July 1827, and shall have paid up all taxes, rents, all debts, dues and demands, that shall have accrued against said Yoder by cause of his owning said possessions, so as to save him harmless from all liability, and give him the consignment of the said \$3,500 aforesaid, free from all deduction and drawback, then the said Yoder will, or his heirs, &c. shall sell the said property, either by decrease or increase, unto them the said Standiford and Brooks, or the survivor of them," &c.—"and will convey the same by deed of quit claim, with special warranty &c."—But said Yoder does not

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bind himself to convey in case of tender and payment, except only during the month of June, 1827, and will not sell and convey after the 30th of June, 1827."

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By the deposition of James Martin, it appears, that he, desiring to purchase the fifty acres of land applied to Standiford, who told him it belonged to Yoder, he applied to Yoder and purchased fifty acres for three hundred dollars. This was after harvest, in 1824. Murphy, in whom the title was, and Standiford and Yoder, joined in a deed to him. He has paid Yoder one hundred and fifty dollars, and Yoder has judgment for the residue, \$150, yet unsatisfied. It does not appear that Standiford has exercised any other right over the property than as lessee.

It does appear, from the depositions of Phillips, Smith and Squire Brooks, that before the sale, Standiford and Squire Brooks went up to Yoder's; that Yoder came down with them, with intent to bid at the sheriff's sale for the property; and it is not to be doubted, from the facts and circumstances, that Yoder's intentions in bidding for the property were, after securing himself, to befriend Standiford's family; and it is equally clear, from the facts detailed, from the persons who were attending the sale, and from the circumstances attendant on it, that if Yoder had not bid, but had yielded to the persuasions of the creditor, Phillips, that creditor would have been the bidder, without any rivalry competent to make the sales produce more, if so much as Phillips' own executions.

It is objected, that three parcels of land were sold together; that lots of three or more slaves were sold; the wagon, team, and harness in another lot; and 40 head of cattle in another lot. The evidence of these facts rests in the return of the officer upon the precepts under which he acted. That these lots were counselled, advised, or requested by Yoder or Standiford, or flowed from any other source that the discretion of the officer conducting the sale, cannot be with truth asserted, from any fact, or inference from a fact, detailed in evidence. Atterburn, one of the complainants, was there; his

judgment was of 1822, and his execution was also in the hands of the sheriff; he witnessed the sales; if those were valid objections to the sale, if his interests had been thereby prejudiced, the court whose precepts had been abused, had full power and authority, in a summary way, to quash the sales. But then the effect would have been a re-sale, subject to the liens of the executions according to their respective priorities; Phillips' four executions, amounting to near three thousand dollars, and the two for the use of Guthrie, assigned to Yoder, would have had still their priorities over Atterburn. From the evidence the inference is fair, that the three parcels of land described in the sheriff's return, as derived to Standiford from several sources, were in fact contiguous and constituted, whilst owned by him, one tract; that the negroes were so sold in lots from motives of humanity; and that no injury has resulted to any one, nor any diminution of price, by reason of selling the land in one lot, the slaves in several lots, and the cattle in another. The time necessary for other duties of the officer, as well as his own judgment and discretion, must, to some extent, be consulted in selling by classes or by individualities. Would any court order the sheriff to sell forty head of cattle, and fifty head of hogs, and a dozen chairs, one by one? or to separate the mother and her children? If no abuse of authority, or of the discretionary powers confided to the officer, is made to appear, the court ought not to invalidate the sale. (Lawrence vs. Speed, 2. Bibb, 404.)

That the \$2,513, paid on the day of sale, were furnished by Standiford, as charged by the bill, is not supported by the proof. It is clear that Yoder purchased with his own means and money.

The bill charges, that Yoder and Standiford dissuaded others from bidding against Yoder. What were the arguments used, and with what success, the bill does not explain; they might be innocent or guilty, according to their kind. The answers deny the charge. The only explanation of this charge rests upon the solitary deposition of Phillips, the creditor, who himself solicited Yoder not to bid,

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that his own executions might be predominant; but Yoder did bid. This charge in the bill dwindles down to this; Yoder "told me not to bid, that I had run the same (the property) up high on him; that I should have my money." It does not appear that Yoder's request to Phillips had greater effect on him, than his previous request had on Yoder.

But Phillips states, that some of the negroes were knocked off to Mrs. Brooks, the mother of Mrs. Standiford. Yoder said to her, she must give up her purchase to him; Phillips did not hear her reply. Solomon Neil, however, states she did relinquish her bid to Yoder; the officer so understood, and has returned Yoder as the purchaser. This is catching at straws. See *Small & Carr vs. Hodgen*, 1 Litt. 16.

We are then brought to the inquiry, whether the purchases made by Yoder under these executions, with his own means and money, ought to be impeached, and set aside in equity, because of the friendly intent of Yoder to aid and assist the family of Standiford, by giving Standiford time to repurchase the property if he could.

What is there in this transaction to impeach the sale by the sheriff, and the purchase of Yoder thereunder, as unlawful, and made with intent to defraud, hinder, or delay the creditors of Standiford? The judgments and executions of Phillips, and of Samuel Churchill to the use of Guthrie, which were levied upon this property, and under which the sale was made, are not impeached. The sale was by authority, and in obedience to law, at the instance of creditors, by force and command of their lawful precepts to the officer; no collusion of the officer of the law with Standiford, or with Yoder, is proved; no evidence gives color to such a suspicion against the sheriff who conducted the sale. What "malice, fraud, covin, collusion, or guile" was had, made, or contrived against creditors, to delay, hinder, or defraud them; or to delay, hinder or defraud the complainants in particular?

By the levy of the executions, those creditors acquired the specific lien on the property; the sheriff

was bound by law and the duties of his office to sell the property; he did sell according to law and the duties of his office, without fraud or collusion. By the seizure, the title of Standiford was divested, and the property was by law vested in the sheriff; he sold and conveyed it to Yoder. Why has not Yoder a good title? Did the intent of Yoder to act as a friend to Standiford's family authorize the sheriff to reject the bids of Yoder? What wrong against creditors, or what evil against society, did Yoder commit in his biddings for this property? Why is the sale required to be advertised, open, and public, but that every one who will may bid?

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By law, the property seized and sold under those executions, was not required to be sold for any given portion of its value; it was to be sold for whatever it would bring, not by appraisement. By the former examples of sales of his property, of 1200 acres for \$20, and of 300 acres for about \$40, as well as by the well known history of sales in this state under executions, Standiford had good reasons to expect enormous and ruinous sacrifices of his property under those executions, unless he could produce more than ordinary competition in the biddings. In this situation, he was bound, however, in seeking measures for lessening the stroke of calamity, to conduct himself lawfully; to abstain from fraud, collusion or guile, to delay, hinder or defraud his creditors. But was he forbidden to use means to enhance the prices of his property at the sales under execution? Was he forbidden to use means to prevent one creditor, whose executions held the prior lien, from engrossing the whole estate, to the exclusion of the other creditors? Was he bound to fold his arms, stare ruin in the face, and resign himself quietly to penury and despair? Was he forbidden to ask the aid of friends, or to appeal to the sympathies of society? Were his connexions and friends prohibited from becoming bidders at the sale, and creditors, and those estranged in feeling and sympathy from himself and family, the only invited and lawful bidders? Was Mrs. Standiford to be removed beyond the circle of her relations and friends, to receive no shelter from the calamities of her hus-

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band, no compassion from society? Were the foundations of social duties to be subverted, the ties of friendship to be dissolved and its offices forbidden? Was society interdicted from all compassion? Were Standiford and family to be repudiated from all social rights, like unto culprits, in the worst days of Roman tyranny, banished upon a charge of violated majesty, and interdicted the use of fire and water? Extravagant as these interrogations may seem, they do but point to the absurd consequences of the arguments against the validity of Yoder's purchase at the sale by the sheriff, drawn from the facts, that Standiford and Brooks, the brother of Mrs. Standiford, brought Yoder from another county to bid at the sale; that Yoder was an old friend of Mrs. Standiford's father, that Mrs. Standiford's brothers and brother-in-law and mother were anxious for Yoder to become the best bidder at the sale, and that Yoder interfered with intention to aid and assist Standiford and his family. If the acts of Yoder were not unlawful, his benevolent intentions, which accompanied those acts, cannot be converted into a constructive offence against the law. The true question is, were the acts of Yoder, in acquiring the property at the sheriff's sale, or in the use of that property afterwards, unlawful? That Yoder paid his own money for the purchases on the day of sale, that he used his own credit and means, and not the money, or credit or means of Standiford, has been before stated, as the clear result of the testimony. That the sheriff conducted the sales fairly, without fraud or collusion, is clear. That Yoder was the best bidder is clear, and as such he received the deed of the sheriff for the property so purchased, having paid down \$2,513 of his own funds, and complied with the terms of the sale and the law, as to the residue of the purchase, of \$3,708. How can the friendly intentions of Yoder towards Standiford and his family, be made into "malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures?" What injury has resulted to the lawful and just rights of any person by the conduct of

Yoder in purchasing at this sale? None. It is very clear from the evidence, that Yoder has done nothing more than to prevent Phillips from acquiring the whole property for the amount, or perhaps for a small part, of his four executions.

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The testimony of Mr. Guthrie gives a very practical view of this subject. He had not money to invest in the purchase of property; Phillips' executions were older than his, therefore to be first satisfied; these amounted to near three thousand dollars; so that persons who bid and became purchasers, were purchasers for Phillips' benefit, until the amount of Phillips executions was raised. Mr. Guthrie saw this, and that it would be necessary to push the sales above Phillips' demands, before he could come in with his executions. In attempting to do so, he saw he might be thrown into a large debt to Phillips, instead of getting his own. Therefore Mr. Guthrie sold his executions to Yoder, who entered into a competition in the biddings against Phillips, which Mr Guthrie would not do.

Thus it was, that the property sold for the amount of the six executions. Phillips did bid, but was overbid by Yoder; Phillips would not give the prices which Yoder gave. Phillips had endeavored to prevent Yoder from attending the sale, that he, Phillips, might be the purchaser. If Yoder had not bid, then Phillips, relieved from the competition of Yoder, would have been unwilling to bid the property up to a greater amount than his own executions, if to so much; Standiford's whole estate would have been sold for Phillips' benefit, and Standiford left indebted still upon the judgments and executions in favor of Guthrie. Mr Atterburn, a creditor complainant, was there; he was advised by Phillips to bid, in order to make his (Atterburn's) debt out of the property; Atterburn, however, would not give the prices for which the property sold; he was the best bidder for no article. He was in a worse condition than Guthrie; until Phillips' 4 executions, and Guthrie's two, were satisfied, Atterburn's could not come in. He did not choose to purchase property which he did not want, nor hazard the event

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of becoming the debtor to Phillips and to Guthrie, or Yoder, the assignee of Guthrie. Guthrie was unwilling to hazard bids for property to the extent of three thousand dollars, for Phillips' benefit, to secure his debts upon the two executions next in order to Phillips'; Atterburn was unwilling to push the bids up to \$3,708, and run the risk of being best bidder in the race, to secure his debt next in order after the six executions of Phillips and Guthrie. Phillips advised Atterburn to bid; in that Phillips had an interest. Atterburn's biddings, with a view to make the property sell for enough to pay the six executions of Phillips and Guthrie, and his own also, if prosecuted, would have pushed up the prices of the property at the hazard of Atterburn, and lessened the danger which Phillips had to encounter, of having property knocked off upon him which he did not want, at the prices which he would be compelled to bid in the race with Yoder, in order to make the sales produce the amount of Phillips' executions. From the examples of what the three creditors, Phillips, Guthrie and Atterburn did, and did not, combined with the acts and means of the other persons who were attending at the sales, the conclusion is irresistible, that if Yoder had not bid, Phillips would have met such feeble competition in his biddings, as that he would have purchased the whole estate for an amount far short of his executions, or at the utmost, the sales of the whole estate would not have overgone his executions.

To argue that Yoder, by his becoming the best bidder at the sale, has been injurious to the just and lawful rights of creditors, or that his interference was with intent to delay, hinder, or defraud them of such rights, is argument against fact. Executions in behalf of *bona fide* creditors, had been levied upon the whole estate, real and personal, of E. Standiford; the law had provided no security for the debtor against inordinate sacrifices of his property, but in the voluntary biddings of those who should attend at the time and place of sale. Standiford, warned by former examples, feared the most disastrous consequences. He appealed to Yoder's friendship for his family to save them from ruin and beg-

gary. Yoder, with his own means and money, became the best bidder. Yoder was as free in law to become the purchaser, as any other bidder. The process of the law arrested and seized the estate of Standiford; the officer of the law proceeded, *in rem*, and according to his authority; as well the creditors whose executions were in the hands of the officer, as other creditors, and all other persons, were, by construction of law, invited to bid; Yoder did bid; the law has had its due course, and Yoder became the best bidder and purchaser, under the authority of the law. To a mind, enlarged by the knowledge of human nature and the foundations of civilized society, impressed with the beauty of social duties and affections, stored with just ideas of moral good and evil, with the rules of right and wrong, and the fair and foul in human transactions, mindful of the fixed distinctions of law between that which is just and unjust, the title so acquired by Yoder from the sheriff at the date of the deed, must appear valid, and entitled to the protection of the law. By protecting titles so acquired, general confidence in the sales by the ministers of the law will be cultivated, competition and better price will thereby be induced, to the general benefit of creditors and debtors; offices of friendship and the social duties will be encouraged, and the ligaments of society and the body politic will be strengthened. By abrogating such titles because the purchaser was not actuated solely by selfish mercenary motives, would involve the absurdity of punishing an act which was lawful in itself, for the intention, when even that was not unlawful; public confidence in the ministers of the law would be shaken; and the tendency would be, to loosen the bonds of social duties and affections, and to demoralize society.

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The title of Yoder acquired at the sheriff's sale, being valid, the next inquiry is, has he forfeited that title by his after acts? It is objected to Yoder's right, that the possession of the property has remained with Standiford, and therefore that the conveyance to Yoder must be deemed fraudulent in law. The title of Yoder is derived from the judgments, executions thereon, and the sheriff's sale thereunder.

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His title and his conveyance is from the sheriff, not from Standiford. By the levy of the executions, Standiford's title was vested in the sheriff; Standiford did not, and could not, convey to Yoder. The conveyance to Yoder by the sheriff includes lands, slaves, and goods and chattels, and is duly recorded within the time prescribed by law. Possession of the lands, the sheriff had not the power to give: *Woolfolk vs. Overton*, 3 Litt. 24; same parties, 3 Marsh. 69. To obtain possession under the sheriff's deed, Yoder was left to ulterior measures. The possession of the land remaining with Standiford after the sheriff's sale and conveyance, could not be objected to that conveyance with any colour of reason. But even as to the slaves, goods, and chattels, Yoder received his title and possession from the sheriff; as to these it was the duty of the sheriff to deliver the possession to the purchaser. The former right of property and possession of Standiford, as to the slaves, goods, and chattels, were interrupted and broken by the levy of the executions, and by the sale to Yoder. These were notorious acts, done by the officer of the law; the sale was public and in the presence of the vicinage. This constitutes a wide difference between the case of Yoder, and the case of *Hamilton vs. Russell*, 1 Cran. 310; *Twyne's case*, 3 Co. 80; and other cases of that kind, where in the continuing possession of the grantor of a personal thing, notwithstanding his absolute deed to the grantee, was held to be fraudulent. In all those cases, the conveyances between grantor and grantee were the private acts of the parties, and the possession was uninterruptedly continuing with the grantor. In this case the possession has been broken, interrupted, and changed, not by the private secret doings of the parties; but openly, publicly, and notoriously, by the officer, acting under the precepts, and according to the commands, of the law. The sheriff had possession; he sold openly and publicly, and transferred the right of property and possession to Yoder. If the sheriff had continued in possession notwithstanding his absolute sale and conveyance to Yoder, then the similitude in one feature of this and those cases alluded to, would have obtained:

So, if Standiford himself had, by a private act of his own, whilst in possession, conveyed to Yoder, and notwithstanding such deed Standiford's possession had continued, then the parallel would begin. In the case of a private grant of a personal thing, the continuing possession of the grantor, not competently explained, does deceive, because of the privacy of the deed, and the publicity of the inconsistent possession. In cases of sales under the precepts of the law, and by the officers acting under its mandates, the transfer of the right of property is public, notorious; the possession is not unbroken; the after possession of the original proprietor, whose right of property the ministers of justice have acted upon, and publicly transferred, is not *per se* fraudulent; its duration only is likely to deceive, when so long protracted as to justify an inference of a new right in the possession, acquired from the known grantee under the public acts of the officer of the law. This distinction was recognized by this court in the case of Greathouse and Carrico vs. Brown, decided in June, 1827. In the case of Cole vs. Davies and al. assignees of Maul, bankrupt, 1 Lord Raym. 725; it was resolved: "that if goods of A are seized upon a *fiery facias*, and sold to B *bona fide*, upon valuable consideration; though B permits A to have the goods in his possession, upon condition that A shall pay B the money, as he shall raise it by the sale of the goods, this will not make the execution fraudulent. And in such case, the subsequent act of bankruptcy by A will not defeat the sale."

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So in the case of Watkins vs. Birch, 4 Taun. 823, where a creditor took the goods of the debtor, in execution, (he having confessed a judgment,) and bought them at public auction from the sheriff, and then let them to the debtor for rent, this was ruled not to avoid the sale.

So in Leonard vs. Baker, 1. M. and S. 251, where the goods of the debtor were sold publicly, by trustees under an assignment for the benefit of creditors, and the son of the debtor's wife purchased the goods, and removed part, but left part in possession of his mother for her accommodation, it

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was held that the goods so remaining with the debtor were protected from the execution of a judgment creditor, who had notice of the assignment.

So in *Guthrie vs. Wood*, 1. Starkie's cas: 367, where a tenant had made an assignment for the benefit of creditors; the landlord distrained for rent and the goods were sold upon the distress, the trustee bought the goods out of the trust funds, and afterwards allowed the tenant to continue in possession, it was adjudged that the goods were protected from the execution of a judgment creditor, there being no evidence that the distress and sale were colourable and fraudulent. The chief justice said, that the doctrine relative to possession not accompanying the deed, did not apply so as to make a deed fraudulent, where the conveyance was not by the debtor himself, but by a third person.

Also in the case of *Kidd vs. Rawlinson*, 2. Bos. & Pul. 59; it appeared that the plaintiff, Kidd, had bought the goods for which he sued of the sheriff who had sold them publicly under an execution against A; after his purchase, Kidd allowed A, (being an inn keeper,) to remain in possession of the goods; afterwards A made a bill of sale of the goods to Rawlinson, the defendant, who took possession of them; the jury negatived any intention on the part of the plaintiff, Kidd, to defeat any execution by A's creditors, thereupon it was ruled by the court that the plaintiff, Kidd, was entitled to recover of the defendant, Rawlinson.

In *Meggott, vs. Mills*, (1. lord Ray. 286.) the case was thus. Wilson exercised the trade of victualler, and became indebted to Meggott for ale to a large amount; Wilson quitted that trade, and after exercised that of an innkeeper, rented a house of Mills, and borrowed money of Mills to buy goods to furnish the house; for security of the money so borrowed, Wilson made a bill of sale of the goods to Mills, but Wilson retained the possession of them: After Wilson was become innkeeper, Meggott continued to sell him drink, and Wilson became indebted to Meggott in another sum. Wilson not being able to continue his trade, made an agreement with Mills

to give him security for the money lent, by a new bill of sale of the same goods and others; but before he executed the new bill of sale, Wilson, by contrivance with Meggot, committed an act of bankruptcy; Mills not knowing of the act of bankruptcy, nor of the trick, accepts the new bill of sale. Thereafter Meggot sued out a commission of bankruptcy against Wilson, obtained an assignment from the commissioners of bankruptcy, and thereupon he brought trover against Mills for these goods. It was ruled by Holt, chief justice, at *nisi prius*, and afterwards in the King's-bench, upon a motion for a new trial, and assented to by the whole court, that, "if these goods of Wilson's had been assigned to any other creditor (than Mills,) the keeping of the possession of them (by Wilson) had made the bill of sale fraudulent as to the other creditors; but since the original agreement was thus, and that honestly and really made for securing the money of the defendant, Mills, which he had lent to Wilson for this purpose, the agreement was good and honest."

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In Buller's *nisi prius*, (p. 258,) the doctrine upon the statute of frauds, and the resolves in *Twyne's* case, are stated; then the qualification to the rule respecting possession is thus laid down: "But yet the donor continuing in possession, is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money."

In the American edition of Mr. Starkie's valuable treatise on evidence, title, *Fraudulent Conveyance*, (part IV, vol. 2, p. 616 to 621,) the cases in England, and in the United States, are collected. Mr. Starkie has marked the characteristic and distinguishing features of the cases adjudged upon the subject of possession; and gives the true result in this lucid manner: "Where the sale is made *bona fide* by a third person, the subsequent possession by the debtor will not render it fraudulent, for the act was not intended to prevent the legal owner of goods from allowing another person to keep possession of them."

Upon executions sued by *bona fide* creditors, the
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property was sold by the sheriff, according to law and the duties of his office, at public auction; Yoder became the best bidder, and paid his money; he acquired the right of property; he thereby became the legal owner; and, according to the foregoing decisions, had a right to let, lend, or deposit the property to whomsoever he would, and the suffering the property to remain with Standiford does not invalidate his purchase.

The possession which Standiford held after the sale, is explained by the agreement between Yoder and Standiford, before stated; by that, Yoder reserved and retained the control and dominion of the property. It is said, however, that there is no proof of the execution of that paper. This court must act on it as part of the evidence: no objection was made in the circuit court. Besides, the defendant, Yoder, obtained leave before the hearing, to prove the exhibits referred to in his answers, *visa voce*, at the hearing; and this and the deed of the sheriff, are those exhibits. The doctrine is settled in this court, that exhibits not objected to on the hearing in the court below for want of proof, are to be taken in the appellate court as heard and read, and to be heard and read in this court; that the objection cannot be made for the first time in this court; and this rule has prevailed in cases where no leave to prove exhibits was expressed on the record.

This writing on its face appears as if intended to have the signature of Brooks; but it has been executed by Yoder and by Standiford only. That Yoder would have been willing to get Brooks bound to him for performance of the terms of the lease cannot be doubted. That Brooks would not and did not execute the writing, cannot destroy its legal effect as between those who did execute it, in the absence of suggestion and proof; that it was executed as an escrow, to have force only upon condition that Brooks should execute it. A writing expressing to be the act and deed of a plurality of persons, but executed by a part only of those persons, is nevertheless the act and deed of those who do execute it, unless executed, as an escrow, to take effect only upon condition that all should execute it.

The witnesses say the property sold at low prices. This cannot justify settling aside the sheriff's sale. If that were a ground for relief, but few sales by sheriffs would stand in this country, where estates under execution are sold, not by appraisement, but for whatever shall happen to be bid.

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The case of Hansford vs. Barbour, 3. Marsh. 515, is a very striking instance of inadequacy of price, and of the refusal of the court to avoid the sale.

Upon the prayer of the bill for specific relief, the complainants have not made out a case to entitle them to have that decree, there is not cause made out in proof to impeach the sale and conveyance by the sheriff to Yoder as fraudulent and void. There is no colour for saying the sheriff acted fraudulently or collusively, or abused the precepts which commanded him to sell the property.

It remains to be considered, whether the complainants are entitled to any decree under their prayer for general relief. This leads to the examination of the writing between Yoder and Standiford, and other facts, after Yoder's purchase from the sheriff. Yoder being the absolute owner of the estate, concedes to Standiford, or to Brooks, in consideration of Yoder's esteem "for said Joseph A. Brooks and Nancy Standiford, wife of Elisha Standiford, who are children of his old friends, old Joseph Brooks and Nancy his wife," the right to purchase the property remaining at the end of the lease, by the payment of \$3,500 in gold or silver between the 31st of May and first of July, 1827, but at no time thereafter. Neither Brooks nor Standiford have come under any obligation to Yoder so to purchase, upon the terms specified. The writing gives merely the option as a concession by Yoder, without any correlative stipulation by Standiford that he will so purchase. Yoder, then, is not a mortgagee, nor Standiford a Mortgagor. If the property should have depreciated in value, or by casualty or destruction of part have become of less value than what Yoder gave for it, he has no means in law or in equity to enforce the payment of \$3,500. If this

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court were to order a resale of this property, and it should not sell for as much as Yoder gave, the deficiency cannot be made up to Yoder by any decree over against Standiford. It is not the case of a mortgage, where the mortgagee holds a stipulation from the mortgagor for the debt due, upon which he may resort to the general means of the debtor for any deficit not satisfied by the funds pledged.

The sum of \$2,513, raised by Yoder, and paid to the sheriff on the day of sale, cost him so much in specie, due him from the estate of Joseph Brooks, deceased. The executions of Guthrie, of \$777 04, were paid to Guthrie by Yoder, in specie; the sale bond by Yoder to Phillips, for the residue of Phillips' debt, was for \$418 in paper, making together \$3,706 04, the amount of the six executions. It is said by Phillips, that he received payment of that bond by the hands of Standiford. Yoder and Standiford, by their answers in response to the bill, deny that any part of Yoder's purchase was with money furnished by Standiford, or that Standiford had paid any part of it. Whether Yoder furnished the means to Standiford to pay Phillips' demand on the sale bond, or has since, and before answer, satisfied Standiford, is of no importance. The rule is well settled that a solitary deposition cannot outweigh the denial of the answer. Phillips' deposition and the answers may well stand together. But besides the six executions, Yoder paid to Guthrie for a debt not in execution, 80 or 85 dollars; and for the 300 acres purchased formerly by Guthrie, on a third execution, 40 dollars, which 300 acres Guthrie understands as included in the purchase made by Yoder of the sheriff, and as included in the deed to Yoder and in Yoder's lease to Standiford. If so, Yoder's purchase of these 300 acres of Guthrie was made to consolidate his title to the land bought by him of the sheriff. The several sums paid by Yoder to Guthrie, were paid in specie, and when paid, amounted, with the interest, to \$944 50, but without interest, and according to Yoder's bond to Guthrie, on the day of sale, these sums, so engaged to Guthrie, amounted to \$897. Whether the 300 acres purchased by Guthrie, and sold by him to Yoder, were, or

were not, included and resold by the sheriff to Yoder on the 14th June, 1823; or whether Yoder compounded the six executions, with the additional sums paid to Guthrie, or computed only the \$3,708, and thereof estimated the \$2,513 paid on the day of sale, and the \$777 04, and half of the sale bond of \$518, and interest thereon, as specie, so as to produce the sum of \$3,500 in specie, which he was to have for the property if Standiford should choose to purchase it, is of no importance.

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vs.
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&c.

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By what process Yoder bent his will or fixed his assent to the precise sum of \$3,500 as the price to be paid him, or upon the annual rent of \$275, does not appear. He did so. The property was his own; he had made sacrifices of his ease, and adventured his means, to favor the family of his old friend, Joseph Brooks, dec'd, and to prevent the property of Standiford from being sold at sheriff's sale for prices below what Yoder was willing to give. Having become the legal and rightful owner of the property, he had a right to seek full indemnity, and such profit on his adventure as he thought fit, before he would sell it to Standiford or any other. He had the right also to prescribe the terms and the time. He has done so. He has made time an essential part of the conditional sale held out to Standiford. Being on the part of Yoder but terms of sale proffered, resting entirely at the option of the persons to whom the proffer was made, to accept or not, time is of the essence of the terms proposed. If time is, or can be, in any case, of the essence of a contract, so that non-performance within due time is a forfeiture of the contract, or bar to specific execution, it must be in this case, where a conditional sale is only proposed by the one party, but the time is given to other party, to make his election, and to comply with the terms. This seems to be of that class of cases in which the chancellor will not relieve against lapse of time, and failure to perform within the time stipulated. The case of *Kenny vs. Marsh*, 2 Marsh. 46, 49, is precisely like the present. Marsh purchased, at sheriff's sale, the land on which Kenny lived; Marsh, reciting the purchase on his own execution and sundry others against Kenny, on the day of sale

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executed to Kenny an obligation, by which he bound himself to reconvey and release to Kenny the title he had so acquired, provided Kenny should in due time pay and discharge the several executions aforesaid as the sale bonds became due, and should in a reasonable time pay Marsh the sum due on his own execution. Kenny failed to pay the executions or to furnish the means to Marsh in due time, so that Marsh himself paid the moneys on the sale bonds. Kenny afterwards exhibited his bill against Marsh for a release of the title. The court declared the transaction not a mortgage, in form or in spirit; that the title vested, by the the sheriff's sale, absolutely in Marsh; of course Kenny could not sell nor mortgage it to Marsh. That "the bond of Marsh must then be considered, as it really was, an obligation voluntarily executed, without good or valuable consideration, by Marsh to Kenny, binding him to convey the land, upon condition that the amount therein mentioned should be paid within the times therein specified. Upon Kenny's failure to comply with the condition, Marsh was under no obligation, legal or moral, to convey the land; the right of Kenny to demand a conveyance of the land under the written obligation of Marsh having been forfeited by his failure to comply with the conditions thereof, it rested with Marsh whether he should have the whole or any part of the land, and upon what terms." A like decision was made between *Flowers & Sproule*, 2 Marsh. 54. In *Harrison vs. Lee*, 1 Litt. 194, the Court again, in case of a private sale, with a certificate given by the purchaser, that if the seller paid \$400 in twelve months, he should have back the property, took the distinction between a mortgage and a conditional sale, and refused relief to the first seller, Harrison, because he failed to tender the money within the time appointed by Lee. In remarking upon the case, the court say, "there is one circumstance, however, in this case, which is strong enough to repel all others; there was no mutuality in the contract; no remedy in favor of the appellee, (Lee) to recover his money; and it is evident from the writing, as well as from the testimony of the subscribing witnesses, that the appellee was at the

first to run the risk of the life of the slave." To these may be added, *Baylor vs. Smither's heirs*, 1 Litt. 112-13. YODER & C.
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STANDIFORD
& C.

Waiving the question whether a court of equity would have sustained a bill by the complainants, to be substituted in place of Standiford for the purpose of compelling Yoder to accept of the money from them, for the property, upon the terms stated in the writing, it is sufficient to remark, that the bill is not framed with that aspect; the time has elapsed; there is no allegation of a tender to Yoder by Standiford, nor by any one for him; nor any offer by the complainants to pay the money to Yoder. Dissent of
ch. jus. BIBB.

It seems to me, that the defendant, Yoder, by virtue of his purchase from the sheriff, under the executions of *bona fide* creditors, did acquire an absolute title to the property so sold by the sheriff; that there is nothing to impeach the sheriff's deed as fraudulent; that it would be of dangerous and alarming consequence to impeach the title of Yoder, and filch from him his money by the mere declarations of an intended kindness to the family of Standiford, when it is clear that Yoder purchased with his own means and not with the money or means of Standiford; that the permission given to Standiford to take possession of the property for the purposes, and during the time alluded to in the bill, and exhibits and proofs, has not invalidated Yoder's title, acquired at the sale by the sheriff; and that upon the hearing, the circuit court ought to have dismissed the bill.

Wickliffe for Yoder; *Denny* for Massie and al.

MOTION.

Gore vs. Hedges.

Case 108.

Error to the Nelson Circuit; PAUL I. BOOKER, Judge.

Motions against sheriffs. Notice. Mistakes. Dates. Limitation.

July 2.

Chief Justice BISS delivered the Opinion of the Court.

Notice to the sheriff of the motion against him for failing to return an execution.

GORE gave notice to Hedges, that he would "on the fourth day of the next June term of the Nelson circuit court, which term will commence on the fourth Monday in June, 1824, move" for judgment for the amount of an execution in his favor against Dozier, and for the damages of thirty per cent. thereon, which execution is described as bearing teste on the 25th day of February, 1822, returnable on the 20th April, 1822, issued from said court, to the sheriff of Bullitt, which execution, the notice says, came to the hands of George Hedges, the deputy of said Joseph Hedges, late sheriff of Bullitt, to be executed; and the cause of the motion is stated to be "for your failure to return said execution within one month from the return day expressed in said execution, as you were bound to do, according to law. The notice bears date on the 2d of April, 1822, (before the return day of the execution,) but was served, by delivery of a copy, on the fourth day of April, 1824.

The motion was made on Thursday, the first day of July, in the year 1824, being the fourth day of that term, which began in the month of June.

Judgment of the cir court, quashing the notice.

The court quashed the notice, and dismissed the motion with costs, to this Gore prosecutes this writ of error.

Error in the year (1822 for 1824) in the date of a notice given the sheriff of a motion ag't him, corrected by the statement of the time the court would

The mistake in making the notice bear date in 1822, is corrected by the special description in the body of the notice, that the next June term, alluded to, "will commence on the fourth Monday in June, 1824," and by the service in 1824. These were sufficient to explain to the defendant that the date of the notice at the foot was a mistake, and that the next June term was not that of 1822, but that of 1824.

The statute limits the motion in such cases, to two

years after the return day expressed in the execution, counting the limitation from the said return day to the delivery, or other lawful service of notice of the intended motion. So that the notice was served within the time of limitation.

The statute inflicts the penalty upon the sheriff, by subjecting him to the debt, with thirty per cent. damages, for his neglect, failure or refusal to return the execution according to the command thereof, "for the space of one month after the return day thereof;" the notice is, "for failure to return said execution within one month from the return day expressed in said execution, as you were bound to do according to law." Are the expressions in the notice, as to the failure to return, and those in the statute, equivalent? In the opinion of the court they are: and this opinion is supported by the cases stated and referred to in Starkie's Ev. (American Ed. and notes,) title, Time, part iv, p. 1399. Clayton's case, 5 Co. 2; Berwick's case, 5 Co. 94; Howard's case, 2 Salk. 625; Hoths, 2 Salk. 413.

Judgment reversed and cause remanded, with direction to hear the motion.

Plaintiff to recover his costs.

Denny for plaintiff.

GORE
vs.
HEDGES.

be held at which the motion would be made, and the notice held sufficient.

Limitation of the notions against sheriffs is computed to the time of the service of notice.

"For the space of one month after the return day" and "within one month from the return day," are equivalent expressions.

Thomas &c. vs. Kelsoe.

CHANCERY.

Error to the Montgomery Circuit; S. W. ROBBINS, Judge.

Case 106.

Assignments. Legacies charged on land. Choses in action of jemes covert. Parties in chancery. Assignment of error. Writs of error.

Judge MILLS delivered the Opinion of the Court.

July 2.

BENJAMIN THOMAS departed this life, leaving his widow and eight children, to whom he devised a considerable estate, real and personal, and directed what lands each should have, or how each one's share was to be laid off. Each child was to receive his or her share at the age of twenty-one years, except his son Marcus, who was to have his

Will of Benjamin Thomas.

THOMAS &c.
VL
KELSOE.

share immediately after the death of the testator. With regard to him, the will contains the following clause.

Clause in relation to Marcus Thomas.

"Whereas, my son Marcus, will receive by the appropriations in this will more than an equal division of the estate, it is my will that he shall pay over to the other legatees, as they shall arrive at age, two hundred dollars each, and that he give security to be accepted by the executors for the payment of the same, before he receive title to the land devised to him in this will."

Directions in the will for the division and conveyance of the land.

To give each a title to their land, it is directed that a commissioner shall be appointed by the county court, to survey and lay off the devise in land to each one according to the will, and to convey to each devisee according to law, and that is to vest the title in each child.

Land devised to Marcus.

The land devised to Marcus, is not described by metes and bounds, but the northwardly half of another tract to be laid off in the most convenient manner, including the buildings and spring.

Writing, given by Hughart, husband of one of the devisees, to Kelsoe.

Jane S. Thomas, one of said devisees, married Edward Hughart, and arrived at the age of twenty one years. Hughart executed an instrument of writing to John S. Kelsoe, the defendant in error, reciting that he was indebted to Kelsoe, in the sum of two hundred dollars, and that to secure and pay the same, he conveyed and sold and warranted to Kelsoe, the legacy of two hundred dollars secured by the will of her father, to be paid by Marcus Thomas, her brother, and authorized him to receive the same.

Kelsoe's bill against Hughart and wife and Thomas.

Kelsoe filed this bill against Hughart and wife, and Marcus Thomas, for payment of the legacy. He alleges, "that the said will of Benjamin Thomas bequeathed the said Marcus Thomas, large real and personal property, which he holds by devise from said ancestor, largely superior in amount, to said sum of \$200 which was to be paid to each of the heirs." Another part of the bill charges that the said Marcus fails to pay said sum, or any part thereof, or to renounce the provisions of said will.

The defendants fail to answer, and the bill was taken as confessed, and a decree rendered against Marcus Thomas for the two hundred dollars with interest, payable to Hughart and wife from the time that Mrs. Hughart arrived at age. To reverse this decree, the defendants below have prosecuted their writ of error.

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vs.
KELSOE.

Bill taken for confessed, and decree for Kelsoe.

It is contended that the bill is defective in its allegations, in not shewing that the legacy had become due, from Marcus, by his agreeing to pay it and give security accepted by the executors. It is evident the testator intended to charge the legacy on the land, and Marcus was precluded from obtaining the land till security was given. After that the land would be released, and he and his securities become personally liable.

Legacy was charged on the land, but giving security for its payment, according to the will, would release the land.

The allegations of the bill are general, but still as it is asserted that he holds a large real estate by the devise, it must follow that he had done, that which is necessary to enable him to hold it under the will, that is that he had come under the proper undertaking to pay, and is liable thereto.

Construction of the averments of the bill.

This was a chose in action and the husband could not assign it at law; but he could transfer it in equity, and having done so, it would enable the purchaser, by making all the proper parties, to come at the legacy in the same manner, and to the same extent, as the husband.

Assignee of the husband, of a legacy bequeathed to his wife before coverture, may recover in equity.

But it may be insisted, that as the husband ought not to obtain a decree till the interest of the wife was looked into by the chancellor, and a suitable provision made for her, before he reduced her estate to possession, so the assignee from him ought to be subject to the same rule.

In such cases the wife must be a party, that she may be provided for in the decree.

This would be a valid argument against the decree, if it was assigned for error. But it is not.

Assignment of errors.

It is insisted that the court erred in decreeing the interest of the legacy to Hughart and wife. If this writ of error had been issued by Thomas against Hughart and wife, to get clear of this decree, the objection would be entitled to consideration. But this

Writ of error by two, to a decree against one of them in favor of defendant,

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does not
reach a de-
cree for one
of plaintiff a-
gainst the
other.

is a joint writ of error by Thomas and Hughart and wife against Kelsoe, whose decree is several, and who only has a decree for the legacy, and none of the interest. In short we perceive no error in the decree of the court below.

Decree is affirmed with costs &c.

Ja. Trimble for plaintiffs; *Triplett* for defendant.

MOTION.

Case 107.

Bell vs. Waggener.

Error to the Franklin County Court.

Evidence. Judicial notice. Bank notes. Error.

THIS was a writ of error to a judgment of the county court, rendered in favor of Waggener, a county creditor, against Bell, as county collector, of the levy made in the year 1824, and collectable and payable in the year 1825. The bill of exceptions, which purports to contain all the evidence, does not shew that Bell was collector, nor that the notes on the bank of the commonwealth were of less value than lawful currency; and the judgment was rendered for the nominal amount of the claim in lawful money.

It was assigned for error among other things, that there was no evidence that Bell was the county collector, and that the judgment was erroneous because the court did not scale the paper collected, to its specie value, but rendered judgment in lawful money for the nominal amount.

June 26.

Judge MILLS delivered the opinion of the court.

It seems to the court there was no evidence shewing that the bank paper was less than its nominal amount in value, and there was no error in giving judgment for the amount claimed. Judgment affirmed, with costs and damages.

Petition for a rehearing, by Thomas B. Monroe.

THE Counsel for the plaintiff would respectfully suggest that there are two points in this cause which deserve further consideration.

It seems to be implied in the decision, that this court could take judicial notice, that the justices of the county court did know that Bell was the collector of the county levy of the year 1825, without any statement of their having any such knowledge being found in the bill of exceptions purporting to contain all the evidence in the case; and it seems to be held, that these justices of the county court of Franklin, at the metropolis of Kentucky, did not know, in February, 1826, that paper of the bank of the commonwealth had been of less value than its nominal amount in the preceeding year.

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Petition for
rehearing.

As to the first point it is not intended to insist, that every court may not be bound to know its own officers for the time being; for we have only to combat that *this* court does not know that the county court knew Bell had been their collector, not their sheriff, two years *before* the time of the trial. We know the sheriff and collector are not necessarily the same person. It is one thing for this court to presume the county court may have known the fact, and another thing to conclude they did, when a bill of exceptions appears containing all the evidence, without any mention of such fact. If that court could act on their own knowledge of a fact, which constitutes no part of the record, containing all the testimony, that knowledge must be taken as infallible, and not to be contradicted.

It therefore could not be said Bell might have disproved that he was collector; he could not be required to prove a negative, and much less could he be required to disprove what the tribunal is assumed to have known, *as a court*, and not by evidence in the case. In the trials of questions of fact, the controversy is with the adversary parties, and by evidence in writing; as by records, deeds or other writing, by parol testimony, or inspection, never by the knowledge of the triers, except on matters of universal knowledge, as of History and Geography. Here it cannot be said the acceptance or exercise of the office of county collector by Bell, was matter of general knowledge. It might have been proved, if true, by shewing the order of the court reciting his

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 rehearing.

execution of the bond, and taking the oaths of office, by shewing his bond, or by proving he exercised the duties. But if the order of court had been read in evidence, the effect of it, the copy appearing in the record, would have been a subject for the decision of that and this court, and so of the bond; and the execution of the bond would have been a question for evidence on both sides; and as to proof of the exercise of the office of collector, that might have been a subject of great contrariety of evidence and dispute.

It does, therefore, seem to the counsel, that this court ought to see on what the justices of the county court assumed this fact, since they have given us all the evidence on which they decided. But is it not against all rule, that any tribunal, court or jury, shall decide against any man, on facts they may pretend to know? Is it not an important privilege of the citizen, that he shall not be condemned on such ground, but shall hear and see the evidence, against him, and thereby have an opportunity of revising the decision? There can be no revision of any judgment on points, the court are at liberty to decide without evidence, except in the cases of historical and geographical facts, of which the revising court are as well informed as the inferior tribunal.

As to the statement of the official character of Bell made by the clerk in his entries in this case, they cannot operate against Bell; he had no control over them. The case of Lampton vs. Scott, 3 Marsh. 172, is in point on this question. That case is also referred to, to prove, that as the fact of Bell being collector does not appear, this court cannot take it that it exists.

But surely if the county court could know Bell had been collector of the county levy one year before the trial, they ought to have known that the commonwealths paper, in which it was collectable, was not worth its nominal amount. By the act of Dec. 29th, 1823, Session Acts, 375, the legislature, knowing the bank paper was at a discount, directed the courts expressly, in all such cases, to scale the paper, and give judgment for its real value only.

-It is insisted, that the paper currency of Kentucky being established by law, and thus made the medium in which all the public officers are paid, and the business of the government transacted, and the depreciation universally known, the judicial tribunals of the state ought to take notice judicially of the fact.

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vs.
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rehearing.

The depreciation of the notes of the bank of the commonwealth, is over and over again recognised by the legislature. It is found in the acts of almost every session. And it is believed this court has recognised or referred to the fact in one or more cases almost every term for the last five or six years, in several of which it is believed no evidence is found in the record. In fact, it is impossible that any man can have been ignorant of the matter; and surely what all men know, and what the laws notice, the courts cannot exclude from their judicial knowledge. Fifty years hence, this depreciation of the currency will be recorded in our history, and then the courts will notice it, as they now do the depreciation of the paper money of the revolutionary war; and surely what all men now know, may be as well noticed now by the court, as it can be fifty years hence, when this generation has passed away; and the fact is found only in books and tradition.

It is contended, that as the legislature had directed the money to be scaled; the court was bound to do it, and that if proof of witnesses was necessary, the plaintiff in the motion ought to have produced it before he could have given judgment.

I forbear to comment on the fact, that the plaintiff in the motion was one of the justices who made the appropriation to himself, because it was noticed in the brief.

THE Petition for a re-hearing was overruled.

July

Monroe for plaintiff; *Crittenden* for defendant.

THE
COURT OF APPEALS,
OCTOBER SESSION OF THE FALL TERM, 1826.

GEO. M. BIBB, *Chief Justice of Kentucky.*

WILLIAM OWSLEY, }
BENJAMIN MILLS, } *Judges.*

ON the convening of the Judges on the first day of the present term, the Chief Justice alleged that Judges Owsley and Mills had, in the preceding vacation, resigned their offices of Judges of the Court. Judges Owsley and Mills denied they had resigned, and insisted they were still the Judges. A discussion, partly parol, in the chamber of the Judges, and partly by a correspondence in writing, took place between the parties, on both the facts and law of the case. As to the facts, it was understood there was not a great difference; but as they were not exactly agreed, they cannot be recorded. On the law the parties disagreed; the Chief Justice adhered to his opinion, that Judges Owsley and Mills had resigned; that no court could be formed, and refused to take his seat. Judges Owsley and Mills adhered to their opinion, that they had not resigned, and considered it their duty to hold the court; and accordingly, on the third day of the term, opened court, and held it for the balance of the time of this volume.

CASES

DETERMINED AT THE OCTOBER SESSION

OF THE FALL TERM, 1828.

CHIEF JUSTICE BIBB—*Absent.*

Present—THE HON. WILLIAM OWSLEY, }
THE HON. BENJAMIN MILLS, } *Judges.*

Tribble vs. Frame.

TRESPASS,

Error to the Montgomery Circuit; SILAS W. ROBBINS, Judge. Case 108.

Instructions. Liberum tenementum. Novel assignment.

Judge OWSLEY delivered the opinion of the court.

October 9.

THIS is a writ of error brought to reverse a judgment recovered by Frame in an action of trespass *quare clausum fregit* which was brought against him in the circuit court by Tribble.

Declaration
in trespass—
*quare clausum
fregit*—pleas
and replica-
tions.

The declaration contains two counts, in neither of which are the abutments of the close upon which the trespass is charged to have been committed set forth, and to each count the defendant pleaded separately *liberum tenementum*. To each plea the plaintiff replied, and issues to the country were thereupon joined by the defendant.

After the evidence of each party was through, the court, on the motion of the defendant, instructed the jury, that under the pleadings, to enable the plaintiff to recover in this action, he must shew two distinct closes in the county of Clark, (that being the county in which the closes are described to lie in the declaration,) and also that a trespass was committed on each close.

Instructions
of the court.

It will be observed, that the instruction is not hypothecated upon any opinion which the jury might form upon the evidence introduced or relied on by

It seems that
on the trial
of issues on
general repli-

TRIBBLE
vs.
FRAME.

cations to
pleas of *liberum tenementum*, pleaded to two counts, the court cannot, in any state of evidence, instruct the jury, that to enable the plaintiff to recover, he must prove two closes and a trespass on each.

the defendant to support either plea, so that we must understand the court, by the instructions, to have taken from the jury the consideration of that evidence, and decided it sufficient to support the issues or one of them, on the part of the defendant; or, assuming the evidence insufficient for that purpose, to have decided, that though neither of the issues was supported on the part of the defendant, the plaintiff was not entitled to recover unless he proved that he had as many closes as counts, and that a trespass was committed on each. But whether the one or the other of these alternatives were intended by the court to be decided, the decision is evidently incorrect, and cannot be sustained. If the latter was intended to be decided, the instruction is unquestionably erroneous, because it not only required of the plaintiff, before he could, in the absence of proof on the part of the defendant, recover, that he should have a good cause of action, but also that he should shew as many causes of actions as there are counts in his declaration; and if the former was intended, the decision is equally erroneous, because, in deciding the issues to be supported on the part of the defendant, the court must have encroached upon the office of the jury, whose province it is to judge of the credibility and weight of testimony, and decide the facts involved in the issues made up by the parties.

On a plea of *liberum tenementum* to a declaration of one count, not identifying the *locus in quo*, if the defendant shew title in any close in the county, the verdict must be for him.

But suppose it were admitted that the defendant had land in the county in which the trespass is charged to have been committed, would the plaintiff, after proof of the fact by the defendant, be entitled to recover under the pleadings in this case, without shewing that he had two closes, upon each of which a trespass was committed.

This question is one which was also made and decided by the circuit court, and as the cause must be reversed for the error in the instruction of the court, and the question may possibly be again made upon the return of the cause to that court, it is proper that we should now dispose of it.

If the declaration contained but one count, it is perfectly clear that there could be no recovery by

TRIBBLE
VS.
FRAME.

the plaintiff, provided the defendant proved he had a close in the same county of that in which the trespass is alleged to have been committed. The rule applicable to such a case is given by Chitty in his pleadings, 1 vol. page 605, with strict precision and accuracy. "In trespass to real property," says he, "if the declaration does not state the name or abbuttals of the close &c. with such precision as to avoid the possibility of the defendants having a close &c. in the same parish of a similar description, and the defendant has pleaded *liberum tenementum*, without describing the close, the plaintiff should new assign, and not take issue on the plea; for if he were, he would fail upon the trial, if the defendant could shew that any close in the parish or place stated in the declaration was his freehold." And in his treatise on evidence, Starkie, vol. 3, page 1465, says; "If issue be joined on the plea of *liberum tenementum*, the defendant may elect to what parcel he will apply his plea, and the plaintiff cannot insist on a trespass in any other parcels without a new assignment." "And therefore," says he, "if the plaintiff allege a trespass in his close, situate in the parish of A. generally, and issue be joined on this plea, the defendant would be entitled to a verdict on proving that he had any quantity of land, however small, within the parish."

The correctness of this doctrine of the law was not contested in argument, but its application to a case in which the declaration contains more counts than one, was denied. But if such be the rule applicable to a declaration containing one count only, no reason is discerned why the same rule should not govern declarations containing several counts, provided the plea to each be of the same sort. If, as remarked by Starkie, the defendant may elect to what parcel he will apply his plea, and thereby, on proving that he had a close in the same place, defeat a recovery upon a declaration containing but one count, it would seem necessarily to follow, that if the declaration contains several counts, both of which are general, the defendant may also elect to what parcel to apply his plea, and thereby on like proof defeat a recovery for any one trespass. The

Same rule, however numerous the general counts may be, when the plea of *liberum tenementum* is pleaded to all.

TRIBBLE
vs.
FRANK.

right to make this election and apply his defence to what parcel he pleases, is an advantage which is gained to the defendant by the general pleadings, but which the plaintiff might have prevented by a new assignment, though not by a multiplication of general counts in his declaration.

An original count identifying a close, or a novel assignment, thus fixing the close, is the only mode of encountering the defendant's plea of *liberum tenementum*, where he has title to even one parcel of land in the county.

Sergeant Williams, in treating on the doctrine of new assignments, has, in a very few remarks, presented the subject in a lucid point of view. "It was" says he "anciently the most usual practice in trespass *clausum fregit*, to declare generally for breaking the plaintiff's close at A. This general mode of declaring put the defendant under a difficulty of knowing in what part of the vill of A, the trespass, which the plaintiff meant by his declaration, was committed. The defendant was therefore permitted to plead that the close was his freehold, which he might do without giving it a name, because, as the plaintiff was general in his count, the defendant might be as general in his plea. And if the plaintiff traversed it, he run a great risk; for if the defendant had any part of his land in that vill, the verdict would be for him on that issue. This turned the difficulty upon the plaintiff, and therefore he was almost always driven to a new assignment, in which he ascertained the place with proper exactness." 1. Saun. 299b, N. 6.

Numerous general counts will not answer the purpose of a novel assignment.

It is therefore not by multiplying counts in his declaration, that the difficulty turned upon him by general pleading in trespass *clausum fregit*, is to be escaped by the plaintiff, but it is by a new assignment of the trespass charged in his declaration. It is true that a new assignment is in the nature of a declaration, and it may be contended that, as the declaration contains two counts, one of which should be considered as equivalent to and answering all the purposes of a new assignment. But were the argument admitted to be sound, the difficulty with the plaintiff would be the same. For *liberum tenementum* is pleaded separately to each count, and though either be considered as a new assignment, as both are general, it was as much incumbent upon the plaintiff after plea, to new assign as to the one count

as the other, and as he failed to do so, and took issue on the pleas, the same difficulty was turned upon him as if there had been but one count. Such would indeed be the consequence, we apprehend, of an issue taken on a plea of *liberum tenementum* put in to a new assignment, if the place be not therein ascertained with proper exactness.

TRIBBLE
VS
FRAME.

The defendant, it is said, must plead to a new assignment in the same manner as to a declaration; and if the plea be such as would require a new assignment, if pleaded to a declaration, the plaintiff, it is also said, must new assign in this case. 1 Saun. 299c. N. 6.

Defendant pleads to a new assignment as to the original declaration, and plaintiff may make a second novel assignment.

In whatever point of view, therefore, the counts in the declaration are considered, as they are both general, and *liberum tenementum* is pleaded to each, the plaintiff will not be entitled to recover unless he proves more than one close and trespass, provided the defendant shews that he is entitled to land in the same county in which the trespass is charged to have been committed.

The judgment must, however, for the error in the instruction of the court, which has been noticed, be reversed with cost, the cause remanded to the court below, and if the plaintiff shall fail to obtain leave of the court and withdraw his replications to the pleas, or one of them, and new assign, a new trial of the issues must be had, and such further proceedings there had as may not be inconsistent with the principles of this opinion.

Leave to withdraw replication and novel assign.

Monroe for plaintiff; *Hanson* for defendant.

TRESPASS.

Foster vs. Fletcher.

Case 109.

Appeal from the Nicholas Circuit; Wm. O. BROWN, Judge.

Possession. Growing crop. Sheriff's return. Repugnance. Trespass on goods.

October 9. Judge OWSLEY delivered the opinion of the court.

Declaration
in trespass *de
bonis asportatis*.

FLETCHER sued Foster in trespass *vi et armis*, and declared against him for having, with force and arms, taken, carried away and converted to his use, two hundred barrels of corn, of which Fletcher is alleged to have been the rightful owner, and peaceably possessed.

Plea, trial
and verdict,
and judgment
for plaintiff.

The trial was had on the general issue, with leave to give in evidence any thing that might be specially pleaded; and verdict and judgment for one hundred and forty five dollars were recovered by Fletcher.

It is unnecessary to notice each of the various questions of law moved at the trial and decided by the court, because there is one which, upon principles familiar in practice, must be adjudged to have been erroneously decided, and will, we apprehend, be conclusive against the right of Fletcher to recover in the present form of action. To that question, therefore, the few remarks we shall make will be directed.

Facts of the
case.

The facts out of which the question arose were proved to be substantially these:

In 1820, Fletcher was living on a tract of land in the county of Bath, planted a part thereof in corn, and continued to reside thereon and cultivate the corn until about the middle of July in that year. Prior to that year, there was depending in a court of competent jurisdiction, between Foster and his wife and Leonard Turly, a traverse to an inquisition taken under a warrant for forcible detainer, sued out by Mrs. Foster, before her marriage with Foster; and judgment for restitution having been rendered therein against Turly after the corn was planted by Fletcher, a writ of restitution was sued out on the judgment in favor of Foster, directed to the county of Bath, under which the sheriff to whom the writ was directed entered upon the

land occupied by Fletcher, turned him out of the possession, and delivered the possession thereof to Foster. The sheriff made upon the writ of restitution the following return, to-wit:

FOSTER
vs.
FLETCHER.

"The within named Leonard Turly is no inhabitant of Bath county, and the within named David Foster and wife represented certain premises to me, lying on the waters of Flat creek in Bath county, to be the same in this writ mentioned, which are now occupied by Wm. Fletcher, who they also represent to be privy to Turly; and the plaintiff, Foster, went on the premises and commanded me to give him the possession of the same, which I did, agreeable to the command of the within writ, on the 7th July, 1820, except the crop on the ground, which, by the consent of the plaintiff, was reserved for the said Wm. Fletcher."

Sheriff's return on the writ of restitution.

On being dispossessed, Fletcher left the plantation, did nothing more in cultivating the corn, which was then sufficiently tended, and removed with his family to the distance of two or three miles therefrom, but he occasionally passed through the plantation, and requested Wilson, the tenant then upon the place, under Foster, to take care of the crop.

Immediately on receiving the possession by the sheriff, Foster leased the plantation to Wilson, who, as tenant to Foster, entered thereon, and has continued in possession thereof ever since. In the Autumn of 1820, after the corn, which was growing upon the land when possession was delivered by the sheriff, had become ripe, Foster, claiming it as his own, went into the field, gathered it, and has converted it to his own use.

It is for thus gathering and converting the corn by Foster to his use, that the present action was brought by Fletcher; and the question to which we have alluded is, can the action upon the preceding facts be sustained? or, in other words, assuming the facts to be true, will trespass *vi et armis* lie against Foster for gathering and carrying away the corn, and should not the court have instructed the jury to find as in case of a nonsuit?

**FOSTER
vs.
FLETCHER.**

One person cannot be in the possession of the land and another of the corn growing on it.

In the return of the sheriff of the execution of a writ of possession, certifying he had delivered the possession of the land, a clause stating he had excepted for the defendant the growing corn, is repugnant and void, and plaintiff has possession of all.

Plaintiff must have the possession to maintain trespass.

Nothing is more clear, than that at the time the corn was gathered, it was neither actually or constructively in the possession of Fletcher. The sheriff seems to have entertained a notion, that whilst one is possessed of land, another may have the possession of corn growing upon it: and in his return, after stating that he had delivered the possession of the land agreeable to the command of the writ, he has gone on to except the crop on the ground. But we know of no rule or principle of law by which the possession of crop growing upon land can be separated from the land, so as to place the possession of the land in one, and the crop in another. The crop, whilst growing, is attached to and composes part of the land, and must necessarily be in the possession of whomsoever the land is possessed.

The exception as to the crop, mentioned by the sheriff in his return, is therefore obviously repugnant to the body of his return, by which the premises is stated to have been delivered to Foster agreeable to the command of the writ, and being repugnant, cannot, in opposition to the other parts of the return, be admitted sufficient to prove possession of the crop in Fletcher. Were such a repugnant exception admitted to have any influence, (and whether or not we shall not stop to enquire,) it might possibly destroy entirely the effect of the return as evidence, but could not upon any rational principle establish the possession of the crop to be in Fletcher; and the return out of the case, the other facts are conclusive to show that Fletcher was neither actually nor constructively possessed of the land or crop, when it was gathered and carried away by Foster.

Having failed to shew that he was possessed of the corn at the time the injury complained of by him was committed, it is perfectly clear that Fletcher has shewn no right to maintain his action of trespass *vi et armis*, and that the court should have instructed the jury to find as in case of a nonsuit. For there is no rule of law better settled, and none more frequently recognised and acted on, than that which makes it necessary for a plaintiff, in order to maintain trespass, to have been in possession at the time the injury was committed.

The judgment must be reversed with cost, the cause remanded to the court below, and further proceedings there had not inconsistent with the principles of this opinion.

FOSTER
VS.
FLETCHER.

Crittenden for appellant; *Triplett* for appellee.

Harrison's devisees vs. Fleming.

CHANCERY.

Appeal from the Mason Circuit; WM. P. ROPER, Judge.

Case 110.

Occupants, bona fide and mala fide. Improvements. Devisees. Practice in Chancery.

Judge MILLS delivered the Opinion of the Court.

October 9.

THIS is a fragment of, or rather a supplement to, a controversy well known in this court, as will be seen by the reported cases, 2 Bibb, 171; 4 Bibb, 525; *Harrison's devisees vs. Baker*, 5 Litt. Rep. 250.

Case formerly here.

By these reported cases, it will be discovered, that Fleming recovered from the devisees of Harrison, four hundred acres of land, by a decree of specific performance of a bond given by the testator of the ~~Harrison~~ to George Stockdon, which had passed to Fleming, the appellee, by several assignments. Baker, under Stockdon, the original obligee, had settled on one end of the tract, which contained upwards of 500 acres. One of the devisees or heirs of Harrison settled on the other end, and brought his ejectment, and recovered his judgment against Baker. As the tract contained more than 400 acres, Harrison's devisees, the present appellants, had their election given them from which end the 400 acres should be taken. They elected to convey the end including their own improvements, and to keep the end improved by Baker.

Statement of facts.

Baker brought his bill for compensation for improvements, and has been defeated on the ground that the claim under which he improved was too uncertain and contingent to demand his confidence, or to afford him a reasonable presumption that he could keep the land.

Baker's bill dismissed.

HARRISON'S
devisees
vs.
FLEMING.

Bill of Harri-
son's devisees

Defence of
Fleming.

Decree of the
circuit court.

Bona fide oc-
cupants only,
are entitled
to compensa-
tion for im-
provements
by the com-
mon law.

Devisees who
settle and im-
prove land
the testator
had given his
obligation to
convey, with
full knowl-
edge of the
claim, shall
not be allow-
ed compensa-
tion for their
improvement

Harrison's devisees now bring their bill for compensation for their improvements, which they made on the land which they have been compelled to surrender in discharge of the bond of their ancestor or testator.

The claim has been resisted, on the ground that the case was not one which would warrant compensation, or if it was, that the claim was, or ought to have been, disputed in the original suit brought for the land.

The court below decided against compensation, and the heirs or devisees of Harrison have appealed.

We deem the case of Harrison's devisees vs. Baker, before cited, decisive of their present controversy in principle. If, owing to the known uncertainty that the bond given by Harrison to Stockdon would ever cover the land occupied by Baker, he could not be considered a *bona fide* and innocent possessor, deceived into making improvements under a title which appeared fair, till legally investigated, and he has been considered as improving at his peril, with his eyes open, upon a known hazard of loss, certainly the devisees of Harrison, the present appellants, must be considered as improvers under a title equally uncertain, and acting at their peril. They knew that the bond of their ancestor was out, binding them to convey 400 acres out of either one or the other of two tracts, and that it was liable to fall on that tract which they improved, in the event of their failing to elect to convey, or being able to convey, the other. Moreover they were apprised at the moment of their settlement and first improvement, that the holder of the bond claimed the satisfaction thereof out of this tract, and had settled a tenant thereon. They had made but little progress in improving, before the suit in chancery was brought claiming a specific performance out of this very tract; and most of the improvements have been made pending that protracted, and obstinate controversy, in which they were ever unsuccessful. Add to this, they might have saved the most of their improvements by placing the 400 acres on the other end of the tract, covering the improvements of

HARRISON's
devisees
vs.
FLEMING.

Baker made under the bond, and reserving their own. This however they refused to do, and after pressing upon the appellee the great bulk of their improvements, when they might have saved them, they now demand the price of them. This is claiming to sell their improvements, by forcing a contract through the instrumentality of the extraordinary powers of the chancellor in decreasing specific performance. This is not a case in the slightest degree akin to the cases provided for by the acts respecting occupying claimants of land. It is a case where the appellants have not lost land which they believed to be their own, but where they have been compelled to give up land, which their ancestor or testator had sold, and agreed to convey, and which they refused to convey until compelled by the extremity of law, and which they could not avoid conveying. If the vendor of land or his heirs, after a sale thereof, can be allowed to improve it, and then to tax the vendee with the price of these improvements, before he can enjoy the land in any case, it must be one of circumstances more peculiar and extraordinary than the present. This bond claimed some land, and was liable contingently to fall on either tract, until it was satisfied. In the current of events it had to fall on the tract improved by the devisees, or to remain unsatisfied. Their improvements must go with the event, as one to which they were always exposed in the knowledge of all concerned.

This relieves us from deciding the question, whether the claim is barred, because it was or was not asserted, when it might have been, in the original suit. We observe that the improvements were relied on in the answer to the original suit, and we shall barely remark, that the chancellor never admires the splitting up of controversies into numerous suits, where they may be decided in one.

Bar by former decision. Equity does not admire the splitting of controversies into numerous suits.

Decree affirmed with costs.

Triplett for appellants; *Crittenden* for appellee.

CHANCERY.

Robinson vs. Offutt &c.

Case 111.

Appeal from the Woodford Circuit; WILL. L. KELLY, Judge.
*Evidence. Performance of covenants. Release of sureties,
 by novations and giving time to the principal.*

October 9.

Judge MILLS delivered the Opinion of the Court.

Contract.

On the 15th of August, 1820, Hillary and Milford Offutt purchased from the firm of G. & J. Robinson, goods to the amount of \$6,212 61, and executed to the said firm, their note for the payment thereof, with Horatio J. Offutt, Warren Offutt, and Joel Johnson their sureties, expressing that the demand might be discharged in flour, whiskey, tobacco, pork and lard, delivered at Leestown warehouse below Frankfort in the month of March, 1821.

Bill on the
lost obligation.

Jonathan Robinson, one of the obligees, and Milford Offutt, one of the obligors, departed this life before this suit was commenced. George Robinson surviving obligee, brought his bill in equity against the surviving obligors: alleging the loss of this note, and a total failure of the obligors to pay it or any part thereof, and praying a decree for the amount. The defendant Hillary Offutt does not contest his liability.

Hillary Offutt
not contro-
verting the
demand.

The sureties rest their defence on two grounds:

Defence of
the sureties.

1. That the name of Warren Offutt was cut off from the obligation, and the contract as to him cancelled, without consulting the other sureties, which so materially changed the contract, as to release all the sureties.

2. That the produce was delivered at the warehouse, all in due time, and part of it placed by the Robinsons on board of a boat, and while thus progressing in receiving the produce, the Robinsons sold out the produce to Hillary Offutt, and agreed to take \$5,000 for the whole, payable in New Orleans, and took from said Hillary, his separate note for the amount, and they insist that this was a payment sufficient to discharge the obligation, or if it was not, that the new contract with the principal and the giving of further day of payment discharged the sureties.

As to the fact whether Warren Offutt did ever take his name from the obligation by consent of the obligees, the proof is doubtful, one witness proves it positively; but he seems to be illiterate and weak, and has so varied his testimony, by subsequent deposition, and written statements and confessions to others, that credit can scarcely be given to him.

There is also some doubt on the point whether a sufficient quantity of the stipulated commodities were delivered to discharge the whole contract. But we incline to the opinion that it was believed to be enough by the parties, and accepted by the Robinsons in the warehouse as sufficient. Of course the contract was legally discharged, and the sureties could not be bound again, without a new engagement.

But if it be admitted that the produce was not quite all there, and that it was not all received in discharge of the contract; yet the proof is clear that the Robinsons did enter into a new contract with Hillary Offutt, one of the principals and therein did agree to accept \$5,000, in New Orleans for the whole, and Hillary took the boats and hands provided, and descended the river with them. It is true that it is proved that it was agreed between the Robinsons and Hillary Offutt, that if he, Hillary, failed in the payment of the \$5,000, in Orleans, the original note of \$6,212 61, was to remain valid and binding upon the parties. But there is an entire absence of proof that either of the sureties were present or assenting to this latter agreement, and without such assent the agreement would tend to release, instead of to bind them.

There is some attempt to prove that Warren Offutt made acknowledgment afterwards, that he continued bound; but these expressions were probably made use of by him, if used at all, under an ignorance of the legal effect of the second agreement to release him. There is a total absence of proof that he assented to the last agreement when made, and that he agreed to remain bound.

There can be no doubt that the latter agreement, according to the principles of equity, would release

ROBINSON
vs.
OFFUTT &c.
Evidence.

Where the produce delivered to discharge a covenant is believed by the parties to be sufficient, and so accepted, the contract is legally discharged, it seems.

An agreement of the creditor to give the principal debtor further time, is a release of the surety.

Stipulation in such case, that if the new agreement is not performed, the original contract shall remain obligatory, will not bind the sureties unless they assented.

An acknowledgment of a surety that he remained bound, made in ignorance of the effect of the novation between the creditor and principal

ROBINSON
vs.
OFFUTT &c.

is not obliga-
tory.

Release of
sureties by
novations.

the sureties. It cut off the means of then discharging the original contract, and thus reaching their principals. It was a definite agreement reduced to writing, and such as could be enforced by legal remedies. It gave day to the principals to the prejudice of the sureties, and was therefore, in equity, a complete release. The circuit court decreed against the principal, Hillary Offutt, but refused to decree against the sureties. This refusal was correct, and the sureties were held to be discharged rightfully, and the complainant below is entitled to no further relief on this appeal which he has prosecuted.

Decree affirmed with costs.

Crittenden for appellant; *Haggin, Depew* and *Monroe* for appellees.

CHANCERY

January vs. January, Lytle & Steel.

Case 112.

Error to the Mason Circuit; *W. P. ROPER, Judge.*

Practice. Chancery. Liens. Equity. Jurisdiction. Principal and Surety.

October 9.

Chief Justice *BIBB* delivered the Opinion of the Court.

Statement of
the facts.

In the year 1818, Samuel January sold to Thomas H. January part of lot No. 13, with the buildings thereon, in the town of Maysville, for nine thousand dollars, payable in instalments; all of which were paid except the last and a fraction of the next preceding one, which is now part of the subject of controversy. Samuel gave his bond to convey the lot, and took simple notes for the purchase money, without any other security. Thus holding the equitable claim by bond only, Thomas conveyed the lot to Lytle and Steele of Ohio, to indemnify them against the consequences of becoming his bail in an action commenced against him in that State. They had the money to pay after it was recovered against them by judgment, as his bail, whereby the mortgage became forfeited.

Bill of Samuel January.

In the year 1822, Samuel January filed this bill, making both Thomas H. January and Lytle and Steele defendants, to enforce the lien which he held

on the estate for the purchase money unpaid, suggesting the insolvency of Thomas.

JANUARY
vs.
JANUARY & C

Lytle and Steele admit the superiority of the lien of Samuel January, and pray that they may come in next to him for satisfaction in the sale of the estate; and they add to their answer a cross bill for that purpose.

Answer and
cross bill of
Lytle & Steel.

Thomas H. January questions the title of Samuel; prays a rescission of the contract, and that the money which he has paid may be restored, and enough of it paid to Lytle and Steele to satisfy their claim, which he admits to be valid.

Thomas H.
January's
answer.

The court below settled the account between Samuel and Thomas H. January, as well as between Lytle and Steele and Thomas H. January, and decreed a sale of the estate, and the demand of Samuel January to be first satisfied; and Thomas H. January has prosecuted his writ of error.

Decree of the
circuit court.

We have not thought it necessary to recite in detail the controversy relative to the validity of the title. It involves, in this respect, no question new or difficult, and moreover rests chiefly on facts, a report of which could be of no use as a precedent. Nor do we see any error in settling the accounts between the parties, which is questioned by the assignment of error. Suffice it to say, that on these points the court below seems to have decided correctly, and to have committed no error of which Thomas H. January could complain.

Decision be-
low on the
facts, approv-
ed.

But the court nevertheless has erred, to his prejudice, in making their decree, in other respects. Time for payment or redemption indeed was given; but the court seems to have turned the residue of the controversy out of doors to be settled between the commissioner and parties. The former was to judge of the payment and tender, and to determine accordingly whether the estate should or should not be sold. This ought to have been settled according to repeated decisions of this court, after the day of payment expired in term time, and the power to adjudicate thereon could not be delegated to a commissioner.

Mode of sell-
ing estate in
chancery un-
der a decree
enforcing a
lien.

JANUARY
VS.
JANUARY &c.

Act of assembly directing sales under decrees in chancery on longer credit than at the date of the contract, unconstitutional, and so far void.

Where the chancellor has jurisdiction to rescind or enforce a contract for land, and he orders a sale, he will not stop there, but decree in *personam* any balance that may remain.

Otherwise in case of mortgages where there is remedy at law.

Equity had anciently the exclusive jurisdiction of the cases of sureties against their principals; the jurisdiction is now concurrent.

As the decree for this cause must be reversed, we proceed to notice another error committed against the complainant, as well as the defendants, Lytle and Steele. They were subjected to a credit, according to the act of Assembly, unless they would accept bank paper, longer than the law allowed, when the respective contracts between the respective parties were made; when, according to the repeated decisions of this court, the acts of Assembly in question could not constitutionally operate on contracts made before their passage, or render such contracts more worthless by extending the time of payment.

It is objected that the court erred in decreeing the amount to be paid to Samuel January positively, and that it ought only to have enforced the lien, and left the complainant to his remedy at law to recover the balance, if the estate, when sold, should fall short of satisfying the demand. We think differently. It is true, that, under the principles of equity, a court of chancery, when a demand purely of legal cognizance is secured by a mortgage, will not enforce it further than to subject the mortgaged estate to its satisfaction. But this is a contract for land, of which equity has jurisdiction, either to enforce it in favor of either party, or to enforce any lien necessary to its completion; and, in such case, where chancery takes hold of the subject, it will finish it by an entire decree, subjecting the estate mortgaged and decreeing the balance to be paid.

As to the claim of Steele and Lytle, who also, by their cross bill, stand in the attitude of complainants, their claim has arisen against Thomas H. January, for money paid by them for him as his sureties, and of such a claim chancery has complete jurisdiction to decree the amount thereof. A bill in equity was formerly the proper remedy in such case, and at length courts of law took up the subject, and afforded a remedy; but this did not divest the chancellor of his powers over it. The court, therefore, did not enforce either claim beyond its powers. But because the decree is erroneous, on the other grounds already stated, it must be reversed with

cost, and the cause be remanded that such decree and proceedings may be had therein, as shall conform to this opinion.

JANUARY
vs.
JANUARY &c

Haggin for plaintiff; *Crittenden* for defendants.

Garnett &c. vs. Garnett's lessee.

EJECTMENT.

Appeal from the Jessamine Circuit; WM. L. KELLY Judge. Case 113.

Evidence. Possession of defendant. Deeds of conveyance. Relinquishments.

Judge OWSLEY delivered the opinion of the court.

October 11.

Case stated.

THIS is an appeal from a judgment, rendered for two thirds of the land in contest, against the appellants, in an action of ejectment brought in the circuit court by the appellee, against them and Sally Garnett, in favor of the latter of whom judgment was also rendered for one third of the land.

Sally Garnett, in favor of whom judgment for one third was rendered, appears to be the widow of Thomas Garnett, deceased, and the appellants, who were co-defendants with her in the court below, compose, in conjunction with the lessor, William Garnett, the children and heirs of the said Thomas Garnett.

Titles of the parties to the possession of the land in contest.

It was under the title of Thomas Garnett, deceased; that the right to recover was claimed by the plaintiff in the circuit court; and it was upon the ground that the widow of said Thomas was entitled to dower in his land, and was protected in the possession of the mansion house and plantation upon which he resided at his death, rent free, until her dower is assigned her, that, it is presumed, the verdict and judgment for one third of the land was rendered in her favor. It is not, however, important as to the principle upon which the verdict and judgment in her favor were recovered; the plaintiff in the court below, against whom it was rendered, has not thought proper to disturb that judgment by appeal or otherwise, and if it were liable to excep-

GARNETT &c
vs.
GARNETT'S
lessee.

tions it would be travelling out of the case now before the court, to examine its correctness.

The branch of the case complained of, and now presented for revision and correction, relates to the proceedings and judgment for two thirds, against the appellants. Several questions were made and decided by the circuit court; but without noticing all of them in the order they occur in the record, we shall have disposed of whatever is essential to the interests involved by the few remarks which may be made on the refusal of that court to award a new trial.

Motion for a
new trial
overruled.

The new trial was applied for on the ground of the verdict being against or without evidence; and we must, after again and again looking into the evidence, express our surprise how it was possible either for a jury of twelve men to find such a verdict, or, after it was found, for the worthy judge who presided, not to interpose and award a new trial.

It is indispensable in the action of ejectment, to prove, on the trial, the def't was in the possession at the institution of the action, except as to a defendant, admitted to defend the possession of another.

There is not only a total failure of evidence conducing to shew title in the lessor, William Garnett, to two thirds of the land in contest, but there is moreover a total lack of evidence to prove that either of the appellants were, at the commencement of the action, or since, in possession of any part of the land; and no principle is better settled, than to enable a plaintiff in ejectment to recover, he must prove the defendant to be possessed, unless the defendant is made so for the purpose of defending the possession of some other, which appears not to have been the case with the appellants. If, therefore, the lessor's title had been made out in proof, the plaintiff would not, on account of the lack of evidence of possession in the appellants, have been entitled to a verdict against them.

But the lessor's title to two thirds of the land was not made out in evidence.

Title papers
of the plain-
tiff.

The evidence may be sufficient to prove title in the deceased, Thomas Garnett, at the time of his decease; but if so, as one of his children, William Garnett, cannot have inherited more than one equal part of the land, in coparcenary with his brothers and sisters.

It was not, however, in his character of heir that the title of the lessor, William Garnett, was attempted to be derived. A deed of conveyance from him to James H. Garnett, and another deed of subsequent date from James H. Garnett to him, for the same land, were used in evidence; and there was also read to the jury the following relinquishment, written on the deed from William to James H. Garnett, and of the same date: "I do hereby relinquish all the right and title to the within mentioned tract of land, that I hold by deed or any other claim whatsoever; as witness my hand and seal, this 7th day of July, 1812. *Thomas Garnett, [SEAL.]*"

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vs.
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lessee.

This relinquishment and those deeds of conveyance are the only written evidence conducing, in the slightest degree, to prove title in William Garnett, the lessor. It requires, however, but a glance to discern that through those documents no part of the title which Thomas held, can have been transferred to William Garnett. The relinquishment possesses no force. It purports to be given to no person, and of course no person can take any thing by it. A grantee is essential to the validity of a grant, as that there should be a grantor, or a thing granted.

Release or deed of conveyance not designating the grantee, cannot pass the title.

It results, that the verdict was without evidence, and should have been set aside. The judgment must be reversed with cost, the cause remanded to the court below, and further proceedings there had not inconsistent with this opinion.

New trial awarded.

Crittenden for appellant; *Haggin* for appellees.

Durrett &c. vs. Whiting &c.

CHANCERY.

Error to the Bourbon Circuit; GEO. SHANNON, Judge.

Case 114.

Practice in chancery. Mortgages. Jurisdiction.

Judge MILLS delivered the Opinion of the Court.

October 11.

WHITING sold to Crockett a large quantity of saltpeter, for which Crockett agreed to pay a stipulated price, by articles of agreement between them. To secure the payment, Crockett mortgaged to Whiting sundry slaves by name. To foreclose

Whiting's bill.

DURRETT &c
vs.
WHITING &c

this mortgage, Whiting filed this bill in the court below, making Durrett a defendant and charging him as a purchaser of one of the slaves. Durrett answered that he was a purchaser for a valuable consideration without notice.

Crockett's
answer.

The answer of Crockett need not be noticed.

Decree of the
circuit court.

The court below settled the account between Whiting and Crockett, and decreed the amount against him positively, and subjected the slave in the hands of Durrett.

Errors assigned,
obviated
by the return
of *certiorari*
in part.

Crockett sued out this writ of error, assigning that there is error in the sale of the slave in his possession, because the mortgage was not recorded in the proper office, and there was no proof of actual notice to him.

This error proves to be founded on a mistaken state of the the record, as is proved by the return to a *certiorari* suggesting a diminution. Whiting lived in Jefferson, and Crockett in Jessamine, and the mortgage was recorded in both counties in proper time. The slave is therefore bound for the demand, and Durrett is compelled to take notice of the mortgage.

Mode of fore-
closing the
equity of re-
demption,
and effecting
a sale of
mortgaged
estate.

It is also assigned for error, that the decree gave no day for redemption, but decreed a sale at once. This error is well assigned, and as Durrett stands as to one slave in the shoes of Crockett, he may complain of it. It is well settled, as formerly held by this court, that day of redemption ought to be given before a positive foreclosure or sale, and that day, under the practice of this country, is generally from one term to another, and must end in term time, so that the court may decide on the fact of payment or non payment and tender, and then direct further proceedings, instead of leaving it to a commissioner or to the sheriffs of the different counties where the property should be found to determine this fact, and to sell, or not to sell, the slaves accordingly, as is directed by this decree.

Where the
chancellor
has no juris-

Another error is also apparent in this decree, the court below has decreed positively the whole sum in favor of Whiting, and has authorized the complain-

ant to issue execution for the whole or to pursue the slaves wherever they may be found. This is a case where the chancellor will not take jurisdiction of the demand, further than to subject the mortgaged estate, and will leave the party to his remedy at law to recover any balance that may be due, according to the principles recognized by this court in the case of *Downing &c. vs. Palmateer*, 1 Mon. 64.

**DURRETT &c
vs.
WHITING &c**
diction of the original demand, he will only enforce the lien, and send the party to law for the balance.

The chancellor here has no exclusive jurisdiction of the original demand, or jurisdiction concurrent with a court of law, and therefore will not interfere further than to subject the mortgaged estate.

For these reasons alone, the decree must be reversed with costs, and the cause be remanded to the court below, with directions to enter such decree as shall conform to this opinion.

Mandate.

Crittenden and Monroe for plaintiffs; *Barry and Depew* for defendants.

Simpson &c. vs. the F. and M. Bank of Lexington.

MOTION.

Error to the Montgomery Circuit; S. W. ROBBINS, Judge. Case 115.

Executions. Replevin bonds. Statutes. Constructions.

Judge Owsley delivered the Opinion of the Court.

October 13.

In a petition and summons, which was brought by the defendants in error, against *Simpson*, one of the plaintiffs in error, and others, in the Montgomery circuit court, such proceedings were had as that a judgement was rendered in favor of the defendants in error for \$1,490, besides interest and cost.

Judgment for the Bank, on a petition and summons

Recently after the judgment, and on the 30th June, 1828, the plaintiffs in error, together with others, went into the clerk's office, and in the form presented by the act of assembly on that subject, entered into and executed a recognisance, binding themselves to pay to the defendants in error, the amount of the judgment, within two years from the date thereof.

Recognisance in the nature of a replevin bond, for the amount of the judgment

SIMPSON & C.
 vs.
 F. & M. BANK
 OF LEX'N.

Execution on
 the recognis-
 ance.

Motion to
 quash the ex-
 ecution issued
 on the recog-
 nissance, over-
 ruled.

Grounds of
 the motion.

Ninth sec. of
 the act of
 1820, author-
 izing a replevin for 12
 months, of
 executions is-
 sued on re-
 cognisances,
 does not ap-
 ply to recog-
 nissances en-
 tered into af-
 ter that en-
 actment, but
 applies to
 prior cases.

The amount of the recognisance was not paid at the time stipulated, and on the 18th of July, 1825, an execution was issued thereon in favor of the defendants in error, against the estate of the plaintiff &c. with an endorsement made thereon by the clerk, that no security is to be taken &c.

At the September term thereafter, a motion was made by the plaintiff in error, to quash the execution; but the motion was overruled by the court.

To reverse the judgment of the court overruling the motion, this writ of error is prosecuted.

On the part of the plaintiffs in error, it is contended that, by the act of 1820, 1 Dig. L. K. 502, under which the recognisance was executed, the defendants in any execution which might thereafter issue thereon, are authorized to again replevy for one year, and on failure to do so, the officer is directed to sell the property taken in execution, at a credit of twelve months; and hence it is insisted, that the clerk did wrong in endorsing on the execution, that no security of any kind was to be taken, and that the court consequently erred in not quashing the execution.

The provision of the act upon which the argument on the part of the plaintiffs in error is founded, is contained in the ninth section; but we are satisfied, upon examining the different parts of the act, that the construction contended for cannot be correct, and should not prevail. There is, no doubt, a class of cases in which, by the provisions of the act, the defendants in executions which issue on recognisances, have the privilege of replevying for twelve months; but those are cases of executions which issue upon recognisances entered into before the passage of the act to which we have referred, and not executions which issue on recognisances taken under that act. Recognisances taken under the act, have the force of replevin bonds, and should be proceeded on by execution and endorsement, as on replevin bonds. But there was an act of the previous session of the legislature, which authorized recognisances of like nature to be entered into by de-

defendants for the payment of judgments within twelve months, and it is, we apprehend, executions which issue on recognisances of that sort, that may, by the provisions of the ninth section of the act of session 1820, be replevied for twelve months. By thus extending to defendants who had previously entered into recognisances for twelve months, the right of a further replevin of twelve months, and not allowing to such as might, after the passage of the act, enter into recognisances, any further replevin, all defendants, whether judgments were rendered against them before, or after, the passage of the act, and whether executions issue on the judgments, or on recognisances, will partake equally of the privileges of a system of replevin, which must have been intended to act equally on all. But to give the act a construction which will allow a further replevin of twelve months on all executions, whether they issue upon recognisances entered into before or after the passage of the act, would extend to defendants by whom recognisances are entered into after the passage of the act, the privilege of delaying the collection of demands owing by them, not only two, but three years, after the date of the first recognisance, and thereby enable all such as might go into the clerk's office and enter into a recognisance, to postpone the collection of demands against them one year longer than it would be possible for defendants to do, against whom executions issue on original judgments or for defendants to do, who had before the passage of the act entered into a recognisance for one year. A construction calculated to act so unequally upon those for whose benefit the act was made, cannot be presumed to conform to the intention of the legislature, and cannot therefore be sustained as correct.

The court was consequently correct in overruling the motion to quash the execution.

The judgment is affirmed, with cost.

Crittenden and Haggin for plaintiffs; *Wickliffe and Combs* for defendants.

SIMPSON & C.
VS.
F. & M. BANK
OF LEX'N.

DEBT.

Estill, for himself and the Madison Seminary, vs. Fox.

Case 116.

Error to the Madison Circuit; GEO. SHANNON, Judge.

Pleading. Gaming. Penal actions. Limitations.

October 13.

Judge OWSLEY delivered the Opinion of the Court.

Declaration.

THIS plaintiff declared against the defendant, in debt, for two hundred and forty dollars, bet at games of cards by the defendant and a certain William Day. The one moiety thereof is alleged to have been bet by the defendant, and the other by Day, who, after having lost his bet, is stated to have paid the amount to the defendant, &c.

Pleas filed,
and demurrer
to one plea
overruled.

The defendant pleaded two pleas; to the first of which issue was taken by the plaintiff to the country, and to the other he filed a demurrer. The demurrer was joined by the defendant, and the plea adjudged good by the court.

The correctness of that decision is the only question made by the assignment of errors.

Plea held
sufficient.

The plea is in the following words: "And for further plea in this behalf, the defendant says, *actio non*, because he says, that he was not indebted to the said Estill, and the trustees of the Madison Academy, or either of them, the bank notes and money in their declaration mentioned, or any part thereof, within three months next before the emanation of the plaintiff's original writ herein; and this he is ready to verify," &c.

Plea, in an action *qui tam*, that the defendants were not in debt to the party within three months before the action commenced, is nought. Defendants could not have been in-

This plea is one of a most singular and novel character, and contains no statement which can, upon any legal principle, form any good defence to the plaintiff's action. In actions of this sort, brought by a common informer, to recover a forfeiture declared by statute, no right to the thing sued for, attaches to or vests in the plaintiff before suit brought. The right to recover the thing forfeited is given by the statute to whomsoever may sue, and it is by the act of commencing suit, and by that only, that the right to the thing vests in the plaintiff. Until the action was commenced by the plaintiff, therefore, the defendant could not have been indebted to him,

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91 480

the commonwealths bank paper mentioned in the declaration though it were forfeited; and of course the denial in the plea by the defendant, that he owed to the plaintiff or the trustees the debt, or any part thereof, within three months before the commencement of the action, is a denial of nothing inconsistent with the plaintiff's right to maintain his action, and nothing that can form a bar to his action.

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Fox.

debted to the plaintiff before the action commenced.

It is suggested in the brief made out by counsel, that it was designed by the plea to rely upon the limitation of three months from the time of the forfeiture before action brought, in bar of a recovery; but if such was the object intended, the plea is certainly illy adapted to the purpose, and cannot be considered as having presented that question in a shape to be judicially noticed.

Plea of the statute of limitation to a penal action.

But, though not presented by the plea, the question is one that may arise on the return of the cause to the court below. The general issue is also pleaded; and the doctrine is well settled, that in actions on penal statutes, it is not necessary for the defendant to plead the statute of limitations; but he may use it in evidence on the trial of the general issue.

Limitation may be relied on, in a penal action, under the general issue.

It is therefore proper that we should now determine whether, after the lapse of three months from the time of forfeiture, the action can be maintained to recover the thing forfeited.

Limitation to the action under the act of 1798, to recover a thing lost at cards and paid, must be computed from the date of payment, and is three months.

It is undoubtedly true, that by the act of 1798, no action could be maintained to recover the thing lost at any game or games whatever, after the expiration of three months; so that if the limitation prescribed in that act is to control the present action, the question must be decided in the negative. But it will be perceived by turning to that act, that it applies only to actions which may be brought to recover something lost at games and actually delivered or paid. Until the thing lost is actually delivered, no action can, according to the provisions of that act, be brought by any person to recover it, nor can the limitation prescribed by that act commence running before the thing lost is delivered.

It is not however upon any of the provisions of The limita-

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ESTILL &c.
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tion to the
action under
the act of
1799, to re-
cover money
or property
bet at cards,
commences
from the loss
of the bet,
and is gov-
erned by the
general lim-
itation law.

that act that the right of the plaintiff to recover in this action is founded. It is not because the thing sued for was actually lost at any game, that the plaintiff has brought his action, but it is because the thing sought to be recovered was bet at games, and therefore forfeited, by the express provisions of the fourth section of the subsequent act of 1799. This latter act contains no provision as to the limitation of time in which the action to recover the thing forfeited must be commenced; but the act is penal in its nature, and the time in which the action should be brought must, we apprehend, be governed by the general limitation applicable to actions founded on statutes of that description. It might be otherwise if, according to any fair and reasonable construction, the limitation prescribed in the act of 1798 could be applied to actions founded on the act of 1799. But this cannot be consistently done. The action which is given by the latter act, is not made to depend upon the happening of those events which are necessary to authorize an action under the former act; nor is it necessary, to maintain the action under the latter, that the plaintiff should establish those facts, from the occurrence of which the limitation prescribed in the former act is made to commence.

It results, therefore, that three months is not the limitation by which actions founded on the act of 1799 are governed.

Judgment re-
versed.

The judgment must be reversed with cost, the cause remanded to the court below, and further proceedings there had not inconsistent with this opinion.

Turner for plaintiff; *Breck* and *Caperton* for defendants.

Tyler vs. Bank of Kentucky.

DEBT

Error to the Jefferson circuit; JOHN P. OLDHAM, Judge.

Case 117.

Bills of exchange. Protest. Evidence.

Judge MILLS delivered the Opinion of the Court.

October 13.

ANDERSON MILLER made his promissory note for \$5,500, to the plaintiff in error, Levi Tyler, payable and negotiable at the branch of the bank of Kentucky, at Louisville. The note was endorsed by Tyler, and then by several others in succession, all for the accommodation of Miller, and it was ultimately discounted by the branch bank, at the instance of Miller, and the proceeds carried to his credit. When the note arrived at maturity, on the last day of grace, it was presented by a notary public, and being dishonored, was protested by him, and due notice thereof in writing, in a letter sent by the notary public, was given to Tyler. The bank then brought this action of debt, and recovered a verdict and judgment against Tyler, for the contents of the note; to reverse which he has prosecuted this writ of error.

Judgment for the bank against Tyler, on his endorsement of a negotiable note, discounted.

On the trial in the court below, various questions were made, both by pleading, and on the evidence, all of which were ruled against Tyler, and there is none of them, except one, but what has been repeatedly decided by this court; and on the most obvious principles they were correctly ruled on the trial in the court below; so that we do not think it necessary to notice them. The one to which we allude is the following; there was no proof that the note was in fact presented and dishonored, except the protest of the notary itself, and this it is contended, is not sufficient, and that the protest is not evidence of these facts, and that the notary himself ought to have been called, or some other who knew the facts, instead of resting on the certificate of the notary, especially as the presentment and dishonor of the bill all happened within this state, and that in such case the certificate or statement of facts by the notary is not the best evidence, and on this point we are referred to 2 Phil. Ev. 36, Chit. on bills 280, 332.

Question stated.

It is true that it is laid down in these authors, that

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vs.
BANK OF KY.

Rule in Chit
t. on Bills,
that the pro-
test of the no-
tary public
of a foreign
bill in Eng-
land, is not
sufficient evi-
dence of the
demand and
non-payment,
is from a sin-
gle pos-revo-
lutionary
case, and not
law.

"in an action on a foreign bill presented abroad the dishonor of the bill will be proved by producing the protest purporting to be attested by a notary public, and proof of the notary's attestation and fixing the seal will not be requisite. But that the presentment of a foreign bill in this country (England) must be proved in the same manner, as if it were an inland bill, or promissory note," in which latter cases the protest of a notary by common law is not necessary, and therefore proves nothing. These elementary writers have incorporated into their works this doctrine from a solitary post-revolutionary decision, which is not authority here, and cannot even be read in court by the directions of a positive statute, and therefore it must rest on reason, and be respected so far as it can be supported on principle. The doctrine is simply this: that when the presentment and dishonor of the bill happens to have happened out of the realm, then the protest of the notary public is evidence of the facts which it certifies; but when the presentment is within the country, then the protest is not the best evidence of the facts stated therein; but these facts must be proved as other facts are, and as they would be proved in the case of an inland bill. Now, in case of an inland bill, no protest is necessary; and if made according to the principles of the common law, it is a nugatory act, and proves nothing, and therefore it is the intention of these writers to say, that a protest of a foreign bill presented at home is incompetent to prove either its presentment or dishonor.

If the doctrine rested on these authorities without any thing to oppose their weight, however respectable they may be, we should hesitate long before we adopted it. If it be correct, it fixes on the law merchant, an inconsistency, which we are unable to reconcile. A protest is essential to a foreign bill, whether it be presented at home or abroad. It is vain to attempt a recovery without it. It is said to enter into the substance of the bill, and even though it be presented and dishonored in the country, its production is indispensable; and it may be forcibly asked, why it is necessary, if it proves nothing when produced, except that there is such a paper with the

notarial seal annexed? A species of evidence indispensably requisite, proves nothing after it is adduced! This is a paradox to us inexplicable.

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But even if these authorities could not be combatted on principle, they are opposed by another still more weighty and decisive in this country, which must prevail. The act of assembly which provides for the appointment of notaries, 2 Dig. L. K. 956; after providing for their appointment and tenure of office adds: "To whose protestations, attestations, and other instruments of publication, due credence is hereby given." And in the last clause it is further provided. "That all instruments of writing, to which by law, the signature and seal of the notary public of any state, city, town or corporation are required, when thus signed and sealed, shall be received as evidence, together with the certificate of the notary public, without any other or further authentication, in any matter of controversy, either in law or chancery, in any of the courts in this commonwealth."

Statute of
Ky. makes
the protest of
the notary
sufficient evi-
dence of the
demand and
nonpayment
of all foreign
bills, and ne-
gotiable
notes placed
on their foot-
ing.

By the express provisions of this act, it is only necessary to ascertain whether the notary has acted in a case in which he is required to act by law, and then the question is settled, that his certificate is evidence. The paper, on which this suit is founded, is placed by the charter of the bank on the footing of a foreign bill of exchange. To them a protest is requisite, and so it is to this note, and as it is required, this act declares it to be evidence, together with the certificate of the notary, without further authentication. It therefore follows that the court below decided correctly, in ruling that the protest and certificate of the notary public, fully proved the presentment and dishonor of this note, and the judgment is therefore affirmed with costs.

Haggin for plaintiffs; *Crittenden* for defendants.

DETINUE.

Reed vs. Greathouse.

Case 118. Appeal from the Mason Circuit; WILLIAM P. ROPER, Judge.
Fraud in sales. Instructions. Error.

October 13. Judge OWSLEY delivered the opinion of the court.

Detinue for a slave by Reed: verdict and judgment for Greathouse. **THIS** is a contest involving the right to a negro slave named Ajax, possessed by Greathouse, and claimed by Reed, and to recover which the latter brought his action of detinue against the former, and was defeated by a verdict and judgment in the circuit court.

Title of Greathouse to the slave. The slave was purchased by Greathouse, at a sale made by a sheriff, under an execution, which came to his hands against the estate of a certain John Merrick, in whose possession the slave then was, and had been for several years previously; and it was by setting up and relying upon that sale and purchase, that Greathouse aided by instructions from the court, succeeded in defeating a recovery by Reed, at the trial in the circuit court

Reed's title. The sale and purchase of the negro as aforesaid, is not contested by Reed, but he contends that at the time the executions under which the sale was made, came to the hands of the sheriff, and when the sale was made, Merrick had but a life estate in the negro; the estate in remainder after Merrick's death being vested in a certain George George, who has since sold that interest to him, Reed, and that it was not the estate in fee of the slave, but the life estate of Merrick which was sold by the sheriff, and purchased by Greathouse.

Error complained of by Reed. —And he complains of the instructions which were given by the court as, being calculated to mislead the jury, by withdrawing their attention and enquiry from the extent of interest which was purchased at the sheriff's sale by Greathouse, to the question of fraud in an agreement which was previously reduced to writing, signed and delivered by Merrick and George George, and duly recorded by which the former acknowledged the negro in question, together with several others, to belong after his death, to the latter, and by which the latter also

acknowledged the right of the same slaves to be in the former during his life.

REED
vs.
GREAT-
HOUSE.

We will therefore without entering upon a more particular statement of the facts proved, turn our attention to the instructions which were given to the jury, and see whether they are liable to the objection taken by Reed.

It is undoubtedly true that if Greathouse purchased nothing more than the interest which Merrick had for life in the negro in question, he should not after holding the possession of the slave during Merrick's life, be permitted to defeat a recovery by Reed, who is the alienee of George. George's interest in remainder, on the ground that the writing, which was executed by Merrick and George, and by which the right in remainder after the death of the former was acknowledged, was fraudulent as to the creditors of Merrick. For though fraudulent, the writing is unquestionably valid between the parties; and if Greathouse only purchased the life estate of Merrick in the negro, he has no pretext for assuming the station of a creditor or purchaser, so as to draw in question the right of George, or his alienee, to the interest in remainder. As to that interest he occupies no better position than a mere volunteer, and whether the writing be fraudulent or not, is a matter of no interest with him, and cannot be enquired into by him.

Purchaser of a life estate only, cannot impeach as fraudulent, a prior conveyance of the remainder, and on that ground claim the entire estate.

It would therefore seem naturally to follow, that any instructions from the court calculated to withdraw the minds of the jury from the materiality or importance of the enquiry, whether more than an estate in the negro for the life of Merrick was purchased by Greathouse, would be irregular, provided evidence conducing to prove that but a life estate was purchased was introduced. Evidence conducing to that end was introduced; and without informing the jury that if but a life estate was purchased by Greathouse he has no right to make the question, or go into the enquiry as to the writing between Merrick and George being fraudulent, or if fraudulent it could avail nothing in favor of a purchaser of the life estate against the estate in re-

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vs.
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HOUSE.

An instruction calculated to divert the attention of the jury from the facts on which their verdict ought to depend, is error, whether right or wrong in the abstract.

mainder, the court assuming the writing to be *per se* fraudulent, instructed the jury accordingly.

The instruction thus given we think was calculated to prejudice the right of Reed, by inducing a belief in the jury, that whatever might be the extent of interest sold to Greathouse by the sheriff, as defendant Greathouse was at liberty to avail himself of the fraud in the writing. A jury, looking to the bench for an exposition of the law, and being disposed to be guided by its indications, would naturally conclude that an unconditional instruction as to the writing being fraudulent, would not be given if, from any conclusion to which they might come on the evidence, the fraud should have no influence; and acting under the influence of such an impression, they would not be disposed to scrutinize the evidence as to the interest sold by the sheriff, or feel the importance of turning their attention to that point. Whether fraudulent or not, therefore, the writing ought not to have been so declared by the court, without pointing out to the jury the bearing or influence which the fraud should have upon their deliberations and ascertainment of the facts which the evidence conduced to prove.

The judgment must be reversed with cost, the cause remanded to the court below, and further proceedings there had not inconsistent with this opinion.

Haggin for appellant; *Crittenden* for appellee.

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CHANCERY.

McMillin vs. McMillin.

Case 119.

Appeal from the Clark Circuit; GEORGE SHANNON, Judge.

Decrees. Conveyances. Wills Mistakes in writings. Parcel contracts for land. Statutes. Evidence. Bar by lapse of time. Possession. Limitation.

October 14. Judge MILLS delivered the opinion of the court.

JAMES McMILLIN, jun. obtained from the court of commissioners, appointed by Virginia to adjudicate upon the right of settlers to vacant lands, in the district of Kentucky, a certificate for a set-

History of the title to the land in contest.

tlement of 400 acres of land, preemption of 1000 acres adjoining, in the year 1779, and assigned the same to William Trimble, who agreed to clear it out of the different offices and carry it into grant for one half of the land. A preemption warrant was obtained, and the proper entries and surveys were made, and grants issued for the whole 1400 acres to said Trimble, as assignee of said James McMillin, jun. A division was made, assigning to Trimble the whole of the settlement and three hundred acres of the preemption contiguous to the settlement; and to the original proprietor, James McMillin, jun. the residue of the preemption, being 700 acres. At this time, James McMillin, sen. the father of the said James McMillin, jun. the original proprietor, and father-in-law of Trimble, had settled upon the said last named 700 acres. with his family, with the assent of his son, James McMillin, jun. and in the year 1788 or 9, the said William Trimble, the patentee, conveyed to the said James McMillin the elder, the said 700 acres of the preemption, by a deed which was never recorded, and is now lost. The said James McMillin the elder, continued to reside on said tract till his death, and sold and conveyed 200 acres, part thereof, to a Mr. Ritchie, retaining 500 acres; and at his death he left a will, by which he devised 300 acres of said 500 acres to his son, William McMillin, now appellee, together with a slave; 100 acres more he devised to his grand son, John McMillin, son of his son James McMillin, jun. the original proprietor, and the remaining 100 acres he devised to his grand son, James McMillin the third, a son of his son Robert McMillin; and to his daughter, the wife of Trimble, he devised a slave. Long after the death of said James McMillin the elder, his son William, the appellee, continued in possession of the tract, he having resided with his father till his marriage, and after his marriage, on the same farm, but in a different house, and being the manager of his father's business during his old age.

Against him, the said William McMillin, the said James McMillin the third, the devisee of the 100 acres, brought an ejectment and recovered a judgment.

**McMILLIN
vs.
McMILLIN.**

**Bill on the
equitable
title.**

**Allegations
of William
McMillin's
bill.**

To be relieved against this judgment he filed this bill in equity, setting up his equitable claim to the whole 500 acres.

His alleged equity is, that in 1783 his brother Robert, father of the present appellant, had secured lands of his own; that his brother James the original proprietor of the present tract had amassed large quantities of land, and that he, William McMillan, was too young to acquire any, and his parents were poor and unable to do so, and that his brother James, the proprietor designed the moiety of this settlement and preemption as a home for his father and mother, during their lives, and after their death to go to him the complainant, and that, for this purpose, it was agreed verbally between the said James sen. the father, James jun. the proprietor, and the complainant, who was then about 14 years of age only, that he the complainant should stay with and support and comfort the parents during their lives, and that after their death, the land and all their estate, should belong to him, the complainant; and that he had complied with his part of the bargain, and assented thereto after he came of age, and after his own marriage, had still continued to support and take care of his parents, and had paid for them large sums of money; that in 1787, having paid a visit to a wealthy uncle in Virginia, the uncle had offered to adopt him as a child, to give him a liberal education, and raise him to a profession; and that this proposition was made known to the parents, and they were unwilling to part with him, and the parol contract touching their estate was then renewed, and it was agreed that 300 acres out of the 700 should be sold to purchase negroes for the parents, and those negroes were to belong to him the complainant at their death; and a bond was given to him, binding his father to convey to him the remaining 400 acres of the tract, which bond he exhibits. That afterwards only 200 acres were sold for slaves to Ritchie, leaving 100 acres, part of the 300, unsold and uncovered by the bond of the father, but which 100 acres he insists he is entitled to, as it was not sold, by virtue of the original parol contract, which was fulfilled on his part. He alleges that he cannot account for

the conveyance from Trimble, the patentee, in fee simple to his father, if it ever existed, and insists it was contrary to the intention of his brother, James junior, the proprietor and donor of the 700 acres. He accounts for his father's disposing of the land first to himself, and then to the appellant by will, by declaring him in his dotage; and insisting that the will is a forgery, procured, if not by the appellant, by some one else for him, palming the will upon the testator; and endeavors to give color to this charge, by charging that the said testator was induced to sign a deed for the land to the appellant, and he, the appellant, had obtained a conveyance of the land from Trimble, the patentee, for the 100 acres, supposing it was never conveyed by Trimble to the testator.

McMILLIN.
vs.
McMILLIN.

The appellant, in his answer, denies all the equity of the bill, contests the execution of the bond set up by the complainant, and pleads and relies on the act to prevent frauds and perjuries, and the statute of limitations, as a bar to all pretended parol agreements. He exhibits a conveyance for the same land from the testator, but states it is dated when he himself was only about two years old; that he found it among the papers of his father; that he knows not whether it is genuine or not, as he is wholly unacquainted with the hand writing of either parties or witnesses, and does not rely upon it, but upon the will of the testator, which now cannot be contested. He admits a deed from Trimble, the patentee, and alleges it was obtained under the impression that the legal title was still in him, the conveyance to the testator by Trimble being lost, or, as he insists, destroyed by the complainant.

James Mc-
Millin's an-
swer.

The court below decreed to the complainant the 100 acres of land, and granted a perpetual injunction. From this decree the defendant in chancery (the plaintiff at law) has appealed.

Decree of the
circuit court.

There are some other grounds of equity set up by the appellee, not before noticed, which we shall barely mention, to shew that they are unavailing. After the death of his father, he filed his bill against the heirs of William Trimble, and obtained a decree

Decree ob-
tained by the
complainant,
Trimble's

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heirs, unavailing.

against them for the conveyance of the legal estate to the whole 500 acres; and a conveyance was accordingly executed. This conveyance, and decree on which it is founded, cannot avail him; for it is shewn that William Trimble, in his life, had conveyed to the father and testator, James McMillin the elder; and of course a decree against *his* heirs could pass nothing. As he had parted with the title in his lifetime, nothing could descend to his heirs; and the loss of the deed which he had made did not restore to him or heirs the legal estate. Besides, the judgment at law proves the legal title in the appellee, and the filing of this bill in equity admits the same fact.

Conveyance by the commissioners of the county court, ineffectual.

The appellee also applied to the county court and obtained the appointment of commissioners, and a conveyance by them in pursuance of the bond which he held, under the act of assembly regulating such proceedings. But it is not shewn that the statutes on this subject were complied with, and the bill tacitly admits that they were not; and the judgment at law is sufficient to get clear of this supposed title. If valid, it must be legal. If it is not legal, it cannot confirm the original equity.

Last wills cannot be successfully assailed in equity, after the lapse of seven years from the probate, unless the complainants are under some disability.

The attack on the will of the testator must likewise be overruled. The will has been proved, and admitted to record, for more than seven years before this suit was brought. It is not shewn that *there is* a disability in any of the parties thereto, which will authorize a contestation of the will, by bill in equity, after seven years have expired, the period to which all such controversies are limited by the act regulating the probate of wills. Of course the will must be held valid, and incontestable.

Bond on Jas McMillin the elder, the complainant, for the land.

As to the bond set up by the complainant, given to him by James McMillin the elder, his father and testator, the proof made by one of the subscribing witnesses, shews that it is genuine. It is in due form, and would, from its terms, authorize the presumption, that it is founded on a valuable consideration. Possession has long remained with it, and we concur with the court below, that it must be held valid, and a good, equitable claim to all the land which it covers.

But a difficulty occurs in its calls. The 400 acres which the testator, James McMillin the elder, stipulated to convey by the terms of the bond, is described as "part of the pre-emption on Howard's lower creek, on which he (James McMillin the elder and obligor) now lives, beginning at the *most south-west end of said preemption*, extending upward so far as to include the above mentioned tract (of 400 acres), and all the improvements whatsoever."

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Call's of the
bond relied
on.

Now if the bond is carried for its beginning to the extreme *south-west* end of the *preemption* literally, and then extended upward for the quantity of 400 acres, with the original lines, it will not include much of the land in contest. But when it is so carried, it will include 300 acres of the pre-emption still belonging to Trimble, the patentee, or his alienees, and which never belonged to the obligor, and which he never could have conveyed.

It is insisted in the bill, that in this respect this call of the bond is mistaken, and that it must be corrected.

Mistake in
the bond re-
lied on in the
bill.

The answer denies, and requires proof of the mistake; and it is now insisted that the parol proof is insufficient to afford the correction.

Answer de-
nying the
mistake.

If the land could be obtained where this call directs it to begin, and the remaining calls of the bond could be complied with, there might be some difficulty in maintaining that the parol proof was sufficient to warrant the chancellor in determining that there was a mistake, and in correcting it. But when the calls are applied to the ground and to the subject then bought and sold in the contemplation of the parties, a violent presumption arises, that one did not intend to buy land which the vendor could not sell, and the vendor to sell that which he had not. Such a contract could not be intended. Add to this, that the remaining call to "include all the improvements whatsoever," could not be complied with by beginning the bond according to the letter. Thus the bond on its face furnishes the correction, as well as the situation of the ground. It was known that Trimble held the settlement, and resided on it, with 300 acres of contiguous preemption land, and the

Mistake in
one of the
calls in the
bond, cor-
rected, by the
fact that oth-
erwise land
would be in-
cluded obli-
gor did not
claim, and by
other calls in
the instru-
ment.

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preemption boundary intended must therefore have been that boundary, to which the vendor extended; and thus, in conformity to the other calls of the bond, this call must be construed. The call for the "most south west end of said preemption," must be held to mean the most south west end of that part of said preemption held by the obligor. Giving the bond this position, it includes most of the land in controversy.

Part of the land in contest not included in the bond relied on.

But there is still some included in the devise to the appellant, and not included in the bond set up by the appellee, which lies between the bond and the 200 acres sold to Ritchie. To recover this, the complainant must rely on his parol contract without writing; and the question is, can he succeed on that equity.

Statute of frauds and perjuries took effect 1st January, 1787, and does not affect parol contracts for land, made before that date.

We put the act to prevent frauds and perjuries out of the question. For that act did not take effect in Virginia till the first day of January, 1787; and before that period this contract was made; and it has been repeatedly held by this court that that act did not affect contracts existing at its passage.

Claim on the parol contract supported by the evidence. But—

The proof does conduce to shew some understanding between the parties, that the testator and his wife should hold the land during their lives; and that the appellee, though then a youth, of about fourteen years of age, should have it at their death as his portion, the rest being supposed to be provided for, and the appellee was to remain with, or be the conductor of the necessary business, and administer to the necessities of his parents in their old age. It is, however, somewhat probable at least, that this arrangement was afterwards modified; and this probability, arises from the acts of the parties. Instead of conveying to the appellee, or to his parents, first a life estate and the remainder to him, according to the agreement, Trimble, with the concurrence of all concerned, conveyed the fee simple to the father and testator. By virtue of this title, the testator sold and conveyed to Ritchie, and made the devise in question; and under the same title, gave his bond to the appellee, and ever treated the land as his own. On an after occasion, it was concluded to

place 300 acres in market, and by bond to secure to the appellee the remaining 400. 200 acres alone were sold. Under these circumstances, there is some ground to infer that the parol contract was settled in 1788, at the giving of the bond. But as there is proof that the proceeds of the land, if sold, was ultimately to go to the appellee, and that where not sold it was to be considered his, it remains to enquire what effect the statute of limitations must have upon the contract.

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The whole tract remained in the possession of James McMillan the elder and testator, till his death, which happened upwards of twenty years before this suit was commenced. A great part of this time the appellant was an infant, but the appellee was not. The appellee was left in possession at the death of the testator. The devise to the appellant included a part of the improvements, which was likewise included in the bond; but that part which is included in the devise, and not included in the bond, was woodland, and was never enclosed till a short time before the ejectment was commenced; and that ejectment has proved the legal estate in the appellee. The appellee is, therefore, attempting to enforce against the legal estate a parol contract, after more than twenty years delay, without any ignorance of his rights, and without any obstacle or impediment in his road. Under such circumstances he must be held to be barred. It has been held by this court, in the case of *Allen &c. vs. Beall's heirs*, 3 Marsh. 554, that a parol contract for land was barred after five years had elapsed, and that as the right to sue at law for a breach was gone, so was the remedy for a specific execution; and that as equity would notice the statute and acknowledge obedience thereto, although not within its letter, it must follow the law, and refuse its aid, where the law held the contract to be ended by delay.

The lapse of five years is a bar to a bill in equity for the performance of a parol contract for land, of which complainant had not held the possession, as it is to an action at law.

We are aware that courts of equity after they adopted the statute as a rule, were anciently in the practice of admitting numerous exceptions not made in the statute, and exempting cases of ignorance, fraud and such like. In modern times, however, chancellors are in the practice of confining them-

Exceptions anciently allowed to this rule not latterly indulged; but the statute law of

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limitations
more strictly
followed.

selves more closely to the act, and refusing to make many of the exceptions formerly held valid. The adhering closely to the statutes in this country has been of essential service to the community in settling landed controversies, while a contrary policy would have kept alive many suits. That the chancellor in this country will in no case take an exception not taken by the statute, we need not determine; and whether possession will or will not make one of these exceptions, we need not now enquire. The possession here was not old enough to bar the legal estate; and indeed the land within the devise and outside of the bond, was not inclosed till late. As to this much, therefore, the statute must be held as a bar, and the court below erred in decreeing that portion to the complainant.

Decree re-
versed in
part.

Decree reversed with cost, and cause remanded, with directions for such decree as shall not be inconsistent with this opinion.

Hanson for appellant, *Wickliffe* for appellee.

7th 564
96 616

EJECTMENT.

Speed &c. vs. Braxdell.

Case 120.

'Appeal from the Mercer Circuit; WM. L. KELLY, Judge.

Pleading. Former decisions. Estoppel. Evidences.

October 15.

Judge OWSLEY delivered the Opinion of the Court.

Judgment in
ejectment re-
covered by
Speed.

AT the trial of the general issue in an action of ejectment brought by Speed against Braxdell, the former recovered a verdict and judgment for the land in contest, the title to which was claimed by Speed, under a patent from the commonwealth of Virginia to John Early, for 1,400 hundred acres, and the possession of which was then held by Braxdell, under a junior patent, for 1000 acres that issued to him. The judgment was appealed from by Braxdell, and was afterwards affirmed by this court.

Braxdell's
bill on his
entry.

Braxdell then brought his bill in equity against Speed, in which he set up and relied upon the entry and survey, under which the patent to him issued, as conferring on him the superior equity to the land,

and praying that Speed might be decreed to surrender to him his legal title, &c.

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Speed answered, contesting the equity set up by Braxdell, and alleging, that notwithstanding Braxdell was possessed of the land at the time the ejectment was commenced against him, his possession had been obtained but recently before that suit was brought, and was then acquired by tortiously entering upon the possession, which he, Speed, and those under whom he claimed, had occupied and enjoyed for upwards of twenty years; and relying upon the lapse of time, insisted, that after such a length of possession, no relief should be given in a court of equity to Braxdell, even were the entry under which he claimed a valid one, &c.

Speed's answer, relying on the 20 years adverse possession, under his grant, prior to the ouster on which he recovered in the ejectment.

On hearing, the court of original jurisdiction dismissed Braxdell's bill.

And the cause was brought to this court by appeal. By the decision of this court, the decree of the court below was affirmed, assigning in that decision, as a reason for the affirmance, that the evidence contained in the record proved Speed and those under whom he claimed had been possessed of the land adversely for upwards of twenty years, as alleged by him in his answer.

Decree of the circuit court affirmed here.

After this, possession of the land was delivered to Speed by the sheriff, under a writ of *habere facias*, which issued upon the judgment recovered by him in the ejectment, and Ripperden was put into the possession under a contract with Speed for the purchase of the land.

Possession obtained by Speed under the judgment in ejectment.

Braxdell then caused a declaration in ejectment for the same land to be served upon Ripperden, who, together with Speed, appeared in court, confessed the lease, entry, and ouster, in the declaration supposed, had themselves made defendants and pleaded, the general issue.

Action of ejectment by Braxdell.

The record also states, that they pleaded a special plea, which was demurred to by Braxdell, and the demurrer was sustained by the court. But there is nothing in the record which enables us with certain-

Entry of a special plea.

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ty to know what plea was intended to be filed as the special plea, to which Braxdell demurred, and which was adjudged bad by the court. In making out the record, the clerk has copied two pleas which are of a special character, and which he states to be the pleas in addition to the general issue which was filed in the cause; but there is no entry upon the order book of but one special plea being filed, and which of those copied by the clerk is the one that was filed and demurred to, the record furnishes no precise or certain information.

Matter of
two special
pleas found in
the transcript
of the record.

It is, however, a matter of no consequence, whether the one or the other of the pleas which are copied by the clerk, was the one adjudged bad by the court, because neither, in our opinion, can be admitted to contain matter available by plea in bar of the action.

The object of the first of those pleas is to rely upon the judgment recovered by Speed in the ejectment, which he brought against Braxdell for the same land, in bar of this action; and the object of the other plea is to rely upon the decree which was pronounced by the court of original jurisdiction, and afterwards affirmed by this court in the suit in chancery which was brought by Braxdell against Speed, to obtain a conveyance of Speed's title in bar of this action.

We have barely given the object of those pleas, without advertg to their allegations at length, because, waiving objections as to their form, and admitting each to contain all appropriate averments, it is evident that the matter intended to be relied on, is not, in either, pleadable in bar of the action.

One judgment in ejectment is no bar to another action at common law.

That judgment in one ejectment is not, upon common law principles, conclusive between the parties, and forms no bar to another action of the same sort, between the same parties, for the same thing, is so well settled that it requires only to be mentioned to receive the universal assent of all who pretend to any knowledge of legal science, and will be assumed by us as incontrovertible, without stopping to cite authorities in support of the principle.

It is true this principle of the common law has undergone a change in this country by a recent act of assembly, but that act has no application to judgments which were rendered before its passage, and cannot therefore have any influence in deciding on the first plea, the judgment in that plea relied on having been recovered by Speed before the passage of the act. The plea must therefore, if sustained at all, be sustained upon common law principles, and we have already seen, that upon those principles, it contains no bar to the action.

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Statute of Kentucky on this subject does not apply to judgment, rendered before its passage.

The other plea, though not governed by the same rule, will be found, upon principles equally palpable, to contain no sufficient bar to the action. The decree to which that plea refers, and on which it was the object of Speed &c. to rely in bar of the present action, is no doubt conclusive between the parties on the same subject matter, and might be pleaded in bar to a suit of the same sort as that in which it was pronounced, or any other of the like nature, for the same thing, between the same parties. But the present action is not of the like nature, nor is the question of right involved in each the same. The one being a suit in chancery, in which nothing but the equitable right set up and claimed by Braxdell was involved, and the other being an action at law, in which the legal title only is drawn in question. The object of the former suit was to obtain from Speed the conveyance of the legal title, with which he was then supposed to be invested; and the object of the latter is to recover the possession of the land under the legal title which Speed was then supposed to have, but which is now claimed by Braxdell to be in him. Suits having such dissimilar objects, and involving questions of right so essentially different, cannot be denominated suits of like nature; nor can the decree which was pronounced in the former against Braxdell constitute a bar to the latter action, which has been brought by him. The judgment or decree, which is the fruit of the action or suit, can only follow the nature of the particular right claimed, and the injury complained of, and can conclude no further than the existence of the right, the injury thereto, and the compensation due for the same. A judg-

Decree dismissing a bill, brought on an entry to obtain a release of an elder grant, is not a bar to an action of ejectment by the complainant against the defendant.

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Decree dismissing a bill on an entry, where the defendant had relied on an adversary possession under his elder grant for 20 years, is evidence in an action of ejectment, by the complainant, claiming to recover on the ground that he had held the possession for the same time: is pertinent evidence on the question of such possession, but not conclusive.

ment or decree is final for its own proper purpose and object and no further; and is conclusive upon its own subject matter only, by way of bar to future litigation for the thing thereby decided.

Having disposed of the pleas, we are next brought to consider whether or not the court below decided correctly in rejecting the record of the chancery suit, which was decided between Braxdell and Speed, from going in evidence to the jury, when offered by Speed and Ripperden, on the trial of the general issue. By the opinion of this court, which is contained in that record, the fact is assumed to have been established by the proof in the chancery suit, that Speed and those under whom he claimed the land, had been in the continued possession of the land for upwards of twenty years before the commencement of that suit, and it appears to have been by force of that continued possession that the decree of the court of original jurisdiction was sustained and affirmed by this court; so that, notwithstanding the chancery suit, and the present action are not of like nature, and though the questions of right involved in each are not the same, the suit in chancery was in truth decided, and the decree pronounced against Braxdell, upon the ground that the fact upon which Braxdell now relies to establish the legal title in him, was disproved in that suit, it being not under any prior grant from the *commonwealth* that Braxdell claims the legal title, but under a continued possession of the land by him for upwards of twenty years, during part or the whole of which time, the possession was adjudged to be in Speed, or those under whom he claims, by the opinion of this court in the chancery suit. The fact upon which Braxdell relies to prove his legal title, having been therefore decided against him in the chancery suit, it is contended on the part of Speed and Ripperden, that the decree on that fact is evidence between the parties in this case, and as such, it is insisted the court erred in rejecting the record of the chancery suit from being used in evidence. If the record be evidence, it unquestionably cannot be conclusive for the purpose it was offered. The fact of continued possession was no doubt one which from

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the pleadings in the chancery suit, it became necessary and proper to decide; and the decision on that fact is doubtless conclusive between the same parties in any other suit of the same sort, for the same subject matter. But in remarking on the pleas, we have already seen that the subject matter of the present action is not the same as that of the chancery suit; nor can the decision of the fact in that suit be conclusive between the parties in this action. "The adjudication," says Starkie, "is offered to prove, either, first, the same fact for the same purpose; that is, where the same matter is again litigated in a court of concurrent jurisdiction; or secondly, to prove the same fact for a different or collateral purpose. In the first case, the judgment is as a plea or bar, and as evidence conclusive between the same parties. In order, however to make such a judgment operate as a conclusive bar in a civil action, it is necessary, it seems, to plead it as an estoppel. If a party will not rely on an estoppel when he may, but takes issue on the fact, the jury will not be bound by the estoppel; for they are to find the truth of the fact." Starkie's Evi. 205. In such a case, however, the author goes on to remark, the judgment, though not relied on as an estoppel, may be used as evidence, and pregnant evidence, to guide the jury who try the second cause. But whether, in not making the adjudication conclusive on the same matter, when offered in evidence on the general issue, between the same parties, for the same purpose, Starkie is or is not correct, is not necessary for us now to decide; for be that as it may, it is perfectly clear that when offered for a different purpose, in a suit involving different rights, the adjudication is not conclusive; though if the question of fact be the same, we apprehend it is evidence to be left to the jury.

Thus it is said, it is not necessary that the former verdict should have been found upon the same precise subject matter, provided the question be the same; and between the same parties. It is laid down in a book of great authority, that it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point

Former decision where evidence, conclusive or otherwise.

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in question, and every matter is evidence that amounts to proof of the point in question. Starkie, 1 vol. 201. It seems, however, that in such a case the verdict would not be conclusive. Bul. N. P. 232; Gil. evi. 29; referred to in 1 Starkie's evi. 201, note n.

The record ought therefore to have been admitted as evidence to the jury, not however as conclusive evidence of the fact decided, but as pertinent evidence upon which, in connexion with other evidence, the jury should ascertain and find the truth of the fact.

The judgment must be reversed with cost, the cause remanded to the court below, and further proceedings there had not inconsistent with the principles of this opinion.

Dariess for appellants; *Crittenden* for appellee.

COVENANT.

Hanson vs. Cowan.

Case 121.

Error to the Fayette Circuit; SILAS W. ROBINS, Judge.

Pleading. Date. Accord and satisfaction.

October 15. Judge OWSLEY delivered the opinion of the court.

Declaration on the obligation of Hanson and others to Cowan, on condition that the party (Hanson &c.) represented, succeeded in a certain suit in chancery.

COWAN declared against Hanson, and omits the date of the deed. The writing is declared to have been made by William Hanson, Benjamin Stout, one of the guardians of the heirs of Wm. Bobb and John Springle, and Samuel Ayres, guardian of the heirs of John Springle, by which they bound themselves, jointly and severally, to pay Cowan \$150, provided the heirs of William Bobb and John Springle, and William Hanson, recover the lot in Lexington which they are contending for with Col. James Morrison, executor of Col. Nicholas, and get clear of paying £400, the purchase money due from Nicholas to Hickey, and now claimed by Morrison; and the plaintiff, Cowan, avers he did all on his part to be performed, and that said heirs of William Bobb and John Springle, and Wm. Hanson, have recovered the lot by due course of law, and without paying the £400.

The defendant pleaded, first, that the plaintiff had not well and truly kept and performed the covenants on his part, which were conditions precedent.

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Second, that subsequent to the covenant declared on, and on the 24th November, 1821, another covenant and agreement was made between said plaintiff of the one part, Benjamin Stout, guardian, Thomas W. Webb, John Williams, and Samuel Vanpelt, of the other part, of and concerning the same matters alluded to in the covenant declared on: by which the said obligors of the second part covenanted and agreed to pay said Cowan \$150, in case the court of appeals should decide in favor of said Bobb's heirs and Springle's heirs, in their suit with Col. Morrison, about said lot in Lexington; but if said heirs did not get a decree of the court of appeals for said lot, without paying the £400, then the said Stout and the others were to pay said Cowan nothing; and he makes profert of said covenant, mutually signed by the said parties, and avers that this last agreement and covenant was executed in lieu of that declared on, and that the said covenant on the part of said Stout and others in the second count, was made, executed, and delivered by them, and received by the plaintiff in full satisfaction of the covenant declared on.

Plea of non-performance of conditions precedent.

Plea of substitution of another covenant in stead of that declared on.

Cowan demurred to each of these pleas, and judgment was thereupon rendered in his favor.

Demurrer to pleas, and judgment for plaintiff.

Covenants performed was also pleaded; and upon the issue joined to that plea, the jury found for Cowan, and judgment was accordingly rendered thereon in his favor.

Plea of covenants performed, found for plaintiff, and judgment

The judgment should have been for Hanson, on the demurrer to his pleas: 1st, Because the declaration is insufficient; the omission to state the date of the covenant was matter of substance, and fatal according to the decision of Metcalf vs. Standiford, 1 Bibb, 618.

Declaration on a covenant without stating the date, is insufficient.

2. The amended plea secondly pleaded, is substantially an accord and satisfaction between the parties, by which the plaintiff, Cowan, did accept the covenant last executed by Stout, and others not

New covenant, executed by part of the original covenantors

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and others, for the same sum, payable on the same condition, and delivered and received in lieu of the former, (before the breach it seems) may be pleaded as a satisfaction

Mandate.

named in the first, in full satisfaction and discharge of the first, upon an agreement in and about the same matters. Though the sum stipulated to be paid in each covenant is the same, the additional security in the latter covenant makes it a good satisfaction, even if it would not have been such, provided it had been executed by the same persons only by whom the first was executed; 2 Starkie's Ev. 25.

The judgment must be reversed with cost, the cause remanded to the court below, and judgment there entered in favor of Hanson, unless Cowan shall obtain leave and amend his declaration; and if he does so, then such further proceedings must be had as may not be inconsistent with the principles of this opinion.

Combs for the plaintiff; *Wickliffe* and *Haggin* for the defendant.

ASSUMPSIT.

Taylor vs. Bank of Illinois.

Case 122.

Error to the Union circuit; ALNEY MCLEAN, Judge.

Depositions. Evidence. Bill of exchange. Protest. Notice. Corporations. Constitutional law. Authentication.

October 15. Judge MILLS delivered the Opinion of the Court.

On the 13th September, 1822, Nicholas Casey, a resident of the state of Illinois, drew his bill of exchange in the following words:

"EXCHANGE FOR \$3860.

Shawneetown. Ill 13 September, 1822.

Bill of exchange sued on.

SIR—Sixty days after date of this, my only bill of the same tenor and date, pay to Samuel Casey or order, three thousand, eight hundred and sixty dollars, value received. (Signed.)

Nicholas Casey."

To John C. Rives, esq. Shawneetown, Ill.

Endorsements.

This bill was endorsed, first, by Samuel Casey, to Gibson Taylor; next, by Taylor to Beverly Miller; by Miller to Thomas Duncan; and by Thomas Dun-

can to the president, directors, and company of the bank of Illinois.

Every party to the bill, except Gibson B. Taylor, were residents of Illinois, and he was a resident of Kentucky.

Indeed, the bill was drawn by Nicholas Casey for the purpose of raising money, and all the rest endorsed it for his accommodation alone. It was discounted by the bank at his instance, and the proceeds carried to his credit. Rives, the drawee, was at the time the bill was discounted, and ever since, the cashier of the bank, and had the custody of its money and papers.

After the bill arrived at maturity, not being paid, the bank brought this suit, for the recovery of the amount, against Gibson B. Taylor, the second endorser, and has recovered a verdict and judgment, from which Taylor has appealed.

There are various questions of law presented in the record on the trial, of which we shall notice all that are worthy to be considered.

The plaintiffs first tendered in evidence a deposition taken in the state of Illinois, under a *dedimus* issued by the clerk of the court below, and a notice given to the defendant in that court. The deposition was objected to, because the *dedimus* was issued by the clerk without any affidavit of the materiality of the witness and of his residence. To obviate this, the plaintiffs introduced and proved by the clerk, that there was an affidavit filed before the *dedimus* issued, but it was lost or mislaid, and still this objection to the deposition was insisted upon, and the clerk's evidence objected to.

We perceive no weight in the objection to the deposition, if the clerk's testimony is admitted, nor do we perceive any valid objection to the admission of the clerk. After the *dedimus* was issued, the affidavit had performed its functions, and although it was the duty of the clerk to preserve it, like other papers in his office, yet if he, through accident, or even design, had mislaid it, as he was the keeper of

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BANK OF
ILLINOIS.

Residence of
the parties.

Bill an accommodation for Casey, and discounted at the bank for his benefit.

Suit by the Bank against Taylor, the second endorser, judgment, and appeal.

Existence and loss of the affidavit, on which a *dedimus* issued to take the deposition of a non-resident, may be proved by the clerk, and thus its place supplied.

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LINOIS.**

it, pointed out by law, and not appointed by the party, we see no propriety in causing the party to lose the testimony which he had prepared, through the act of the officer; and it was competent for the party to shew that he had complied with the law, by the best evidence in his power.

Deposition of a nonresident taken in one suit, may be read in other suits between the same parties, where the same points are at issue.

It is not necessary in such case that the notice to take the deposition designate in what particular suit it was to be taken.

Not necessary, in proving the notice in writing of a protest of a bill, to give the defendant notice to produce the paper: this is an exception to the general rule.

Evidence for the plaintiff given on the trial.

As to the exceptions to the notice, we cannot admit their validity. The notice was served a reasonable time before the deposition was taken, and pointed out the time, even the hour, and place at which the deposition was to be taken, with precision, and described the suit as an action of trespass upon the case, which this really is. But it is insisted, that there were other suits between the same parties in the same court, and of the same character; and the notice did not designate in which the deposition was to be taken. If the deposition was taken in one of them, it could have been read in all, when the same points were in issue, and if there were several, there must have been a greater inducement to the defendant to attend to his interest, which must be supposed to be involved by the testimony, and there could be no deception upon him by not naming which suit.

The deposition itself was objected to, because it conduced to prove notice of the dishonor of the bill, conveyed by a letter sent by the mail, without producing the letter, or having given the defendant notice to produce it.

It may be admitted, as a general rule, that the contents of written documents in the hands of a party cannot be proved against him, without reasonable notice first to produce them; but written notices of the dishonor of bills of exchange, are an exception to this rule, and on well settled authority their contents may be given in evidence by parol, without any previous notice to produce them.

The next question which claims our attention, is a motion made to instruct the jury as in case of a nonsuit, which was overruled by the court below. The statement of facts on which this motion was made is as follows:

River, the drawee of the bill, deposed, that the bill was one for the accommodation of the drawer; and this fact was known to all the endorers. That at the time the bill arrived at maturity, he himself was not at home, but had gone to the city of New-Orleans, on the business of the bank, where he remained till after the bill was due, so that it could not have been presented when due. That he never had any funds of the drawer in his hands, nor were there any circumstances authorising a presumption that he would ever accept or pay the bill; it was customary with the bank to purchase such bills, drawn for accommodation only, in the manner this was.

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The deposition before noticed, proved that the deponent, as agent of the bank, presented the bill on the last day of grace to a notary public, "for the purpose of being protested for nonpayment, *which being accordingly done, he (the deponent) notified the endorers of the same, by putting a written notice into the post-office at Shawneetown, Illinois, directed to the said Gibson B. Taylor, Union county, Kentucky,*" on the next day after the protest. It was also shewn, that there were two post offices in Union county, one at the county seat, within about six hundred yards of which Taylor resided, and another about eight miles from the court house, and about that distance nearer to Shawneetown.

On the back of the bill was written as follows:

"Protested for nonpayment, 15 Nov. 1823.

J. Kirkpatrick, N. P."

No other protest, or evidence thereof, was produced. This is a substantial summary of the proof.

As to the want of a protest, as it seems to have been relied on as important in the court below, we shall at once dismiss it from the controversy. This is, to all intents, an inland bill; and with regard to such, no protest is necessary by the principles of the common law. It is true that we have a statute, as they have in England, which authorizes the protest of such bills; but all the use of it is, to entitle the holder to damages. It is otherwise not essential to

Bill of ex-
change,
drawn in Illi-
nois, by a resi-
dent of that
state on ano-
ther resident,
is inland, and
the protest of
a notary not
necessary."

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and of course
is not evi-
dence of de-
mand and
nonpayment.

the bill. ' We have no evidence before us that the state of Illinois has such a statute; and if we presume that state, in mercantile transactions, to be governed by the law merchant, unaltered by statute, a protest in the case of this bill was not only unnecessary, but, if it had been produced, it could have proved nothing in favor of the holder of the bill. On this point, the language of Justice Johnson, of the Supreme Court, in the case of the Union Bank vs. Hyde, 6 Wheat. 572, (a case in point,) well applies: "By some assumed analogy, or mistaken notions of law, this practice of protesting inland bills has now become very generally prevalent; and since the inundation of the country with bank transactions, and the general resort to this mode of exposing the breaches of punctuality, which occur upon notes, a solemnity, cogency, and legal effect, have been given to such protests in public opinion, which certainly has no foundation in the law merchant. The nullity of a protest on the legal obligation of the parties to an inland bill, is tested by the consideration, that independently of statutory provisions, (if any exist any where) or conventional understanding, the protest on an inland bill is no evidence, in a court of justice, of either of the incidents, which convert the conditional undertaking of an endorser into an absolute assumption."

The protest then aside, it was necessary for the plaintiffs in this case to prove the presentment of the bill at the proper hour, or to excuse it by circumstances, and on its being dishonored, to give notice thereof to the endorser.

There was no presentment made of this bill to the drawee, either for his acceptance or payment; but there are circumstances averred in one count of the declaration, and made out in proof, which fully excuse it. It never was presented for acceptance till it arrived at maturity; nor was it necessary that this should be done, as the bill is not payable at sight, or at so many days after sight, but on a certain day. In such a case, if the bill is presented for acceptance, and acceptance is refused before it is due, immediate notice thereof must be given. On the contrary, it

Bill payable
so many days
after date,
need not be
presented till
due; but if
presen ed for
acceptance
before, and
dishonored,
there must be
immediate
notice.

may be omitted till the time of payment, when both the acceptance and payment may be made a question together. This bill was managed in this way, and on the day of acceptance and payment, it is abundantly shewn, that neither funds nor drawee were within the state.

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It is said to be the duty of the holder of a bill to make diligent search for the drawee at his residence, or to go to him if in the realm, where there is no place of payment, to procure his acceptance or discharge of the bill. But this rule is laid down to fit the case of ignorance of the holder, as to where the drawee or his funds really are; and it cannot be incumbent on the holder to search for one, whom he knows, and can prove, to be beyond any reasonable degree of searching. If on the trial, therefore, the holder can shew that the drawee was so far distant that a search for him would have been nugatory, and that there never were any provisions made by the drawee for the discharge of the bill, as is done here, it will excuse the presentment of the bill, and sufficiently establish the dishonor thereof. A question may be made as to whether the drawee was sufficiently distant. It is said in the books, that if the drawee be in England, he must be sought for; but if he be out of the realm, it will excuse the non-presentment of the bill. The same rule, we apprehend, ought to apply in the United States, as to absence from the state in which the transaction is to be done. Although the whole of the states compose one nation, and are embraced in one government, yet we apprehend it would be a most rigorous rule, which should require a trip across this extensive continent to present a bill. We therefore conceive that absence from the state is a sufficient excuse.

Where there is no place fixed for the payment of a bill, the holder must make diligent search for the drawee, at his residence, or within the realm of England; but here, drawee's absence from the state excuses this duty.

It is however urged, that the plaintiffs here had sent away the drawee on their own business, and therefore ought not to be allowed to excuse the want of presentment by such an absence. We cannot admit that this makes any difference, unless it could be shewn that it was done with a design to dishonor the bill, which is far from being true. The drawer had drawn upon him without consulting

If the bill be drawn on the cashier of a bank without funds, or his authority, the bank holding the bill is not prejudiced by

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sending the cashier a-broad, so that the demand could not be made of him in person.

Want of funds in the hands of drawee of an accommodation inland bill, is no excuse for not giving notice to an endorser entitled to recover on the drawer.

Notice that a notary public had protested an inland bill of exchange, not equivalent to notice of the dishonor of the bill, and is insufficient.

him, or having any authority or encouragement to do so. As he was in the employ of the plaintiff, they sent him on necessary business, when retaining him at home without the necessary funds in his hands belonging to the drawer to discharge the bill would have been useless, and could not have benefited the drawee; and sending him away could not affect the drawer's interest. Of course, no party to the bill can complain of this.

Having seen that the presentment is supplied, and the dishonor of the bill established, we shall turn our attention to another indispensable requisite; and that is, notice to the defendant of the dishonor of the bill. We say indispensable, because it is well settled by high authority, that an accommodation endorser is entitled to strict notice. The court below seems to have gone upon the idea, that as this was not a real mercantile transaction, and that all the parties knew that there were no funds, notice was not necessary. The rule is otherwise: *French's ex'x. vs. the Bank of Columbia, 4 Cranch, 141*. It has been held, that the want of funds in the hands of the drawee, or any reasonable expectation, that the bill would be honored, excuses the want of notice to the drawer; but not so as to the endorser; and we apprehend the exception can never apply to an endorser, unless it was shewn that the endorser was substantially the drawer; that the bill was drawn and endorsed for his benefit; that he received the proceeds, and had no other party to the bill, to which he could resort in case he paid the contents of the bill, which is far from being the case in this transaction.

As notice is necessary, it remains to inquire, whether such a notice is proved as will satisfy the demands of the law. Here, the plaintiff below must fail. Their notice was sent off in sufficient time, but it does not appear that the notice really apprized the defendant of the dishonor of the bill, but barely that a notary public had protested it, when a notary, as we have seen, had nothing to do with it. The language of the deposition, which we have already recited, conveys no other idea. It does not say that

the letter contained any other information than that a notary public had protested the bill, a fact entirely immaterial.

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There is also another defect in this notice, which has been insisted on in argument, and which merits our attention. If it be granted that this letter contained information of a dishonor of the bill, it was not directed to any one of the post offices in the county where there were two. As sending a letter by the mail, is admitted in lieu of personal notice, the holder of the bill ought to direct it to that post office where there was the greatest probability that the person notified would receive it. Hence this letter ought to have been directed to the nearest post office; or if to one more distant, it must be shown that the defendant usually resorts to the most distant office, and there receives his letters. Otherwise the nearest will be taken as the one to which the communication must be sent. If any thing excuses this it must be ignorance in the holder of the defendant's residence, which here does not seem to be the fact. Here, however, the letter, as stated by the witness, was directed to the county only, and was left to make its way through the mail to some post office in the county of Union, without determining which. This was too general, where the residence of the party was known.

Notice of the dishonor of a bill put into the Post office at Shawneetown, directed to defendant, Union county, Ky. where there were two post offices in the county, one at the court-house, near which defendant resided, and the other eight miles distant, is insufficient.

It may be said, that under such direction, the post officers would send to the court house, as of course. There may be some probability that they might do so; but it cannot be legally presumed. It is better to leave the party, who has given such a vague direction, to prove that such was the practice of the office, into which the letter was placed, or rather of the last distributing office, if one intervened, where the letter had the last direction given to it, guiding it to its point of destination, such proof as that might, render such a general direction more specific, but until it is made, we cannot hold this notice good, even if it contained the necessary facts to be communicated. For these defects in the notice, the court below ought to have instructed the jury as in case of a non suit.

Query, if it were proved that by the practice in the proper post office, such a direction would have carried the letter to the county seat.

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This conclusion renders it unnecessary to notice some other acts of the court and of the counsel, which seem to have been predicated on the idea that notice was unnecessary.

It is not necessary, in an act on by the corporation of another state, on the trial of the plea of non-assumpsit, to produce its charter, or otherwise prove its existence.

One other question, which may again, occur on another trial, is worthy of consideration. The plaintiff offered in evidence, the charter of the bank; and it was objected to; and it was insisted that it was necessary that the plaintiff, under the issue in the cause, should shew that there was such a corporation. The issue was non assumpsit, and we do not conceive that this brought the existence of the plaintiff in issue. That the plaintiff, who holds the affirmative of that issue, should be compelled to prove that there was such a being as himself, is a rule with which we are unacquainted. But the charter may become necessary to shew the capacities of the bank, and to fix the degree on which the bill must stand, whether as foreign or inland; and the charter, when produced here has shown nothing, which authorizes the bill to be treated in any other manner than an inland bill; and as it may be again necessary for this purpose to use it, we shall say something on the objection to its admission.

Copy of the statute of Illinois offered to be read in evidence from the printed session acts of the state.

The act was not certified by any officer of the state of Illinois, and there was no seal of the state to verify it; but a pamphlet was produced which stated in its title page that it was printed by the printer to the commonwealth, or then territory, and under that authority, and from that pamphlet the act was allowed to be read.

The constitution of the United States declares that—

Constitution of the U. S. in relation to the public acts and records of the several states.

“Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. “And the the congress may, by general laws, prescribe the manner in which such acts, records, and judicial proceedings shall be proved, and the effect thereof.”

By an act of the 26th of March, 1790, Congress has provided that the acts of the legislatures of

the several states, shall be authenticated by having their respective seals affixed thereto.

The question then may arise—can an act of a sister state be admitted under the municipal provisions of states which do not conform to the act of congress; or must the mode of authentication pointed out by congress be the exclusive mode? As this is a question arising under the constitution and laws of the United States, it would have been satisfactory to us to have met with the decision of the supreme court thereon, but we have found none such.

A circuit court of the United States has touched the subject, and has held that without the authentication required by the act of congress the statute of a sister state could not be used. 1 Peters' Rep. 352; and this decision has been followed in North Carolina. *State vs. Twitty*, 2 Hawkes, 441; 1 Starkie on Ev. 163, in note.

But it was previously held in that state, that the statutes of Virginia, printed under the authority of the commonwealth, were good evidence. *Poindexter vs. Barker*, 2 Haywood, 173. The supreme court of Pennsylvania, in the case of *Thompson vs. Massie*, 1 Dall. 402, admitted the statutes of another state, edited by the public printer, under the authority of the state. The same point was ruled in the same way in, *Bidolis vs. James*, 6 Bin. 391. In the state of Vermont a similar decision has taken place.

Between these conflicting decisions we prefer the latter as most consonant to reason, and conformable to principle. In support of this choice, an act of our own legislature in its spirit is with us.

The third section of an act passed 11th February, 1809, 2 Dig. L. K. 1115: provides, "copies of any of the printed laws of any state or Territory of the United States, which may have been heretofore, or may hereafter, be received in the Secretary's office, and which shall have been printed under the authority of any such state, or territory, when duly certified under the hand and seal of the Secretary of State, shall be admitted and recorded as evidence of such law, in like manner with such printed copy, in any

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Question
stated.

Cases ruling
that no au-
thentication
of the statute
of a sister
state but that
prescribed by
the act of
congress, is
competent.

Cases contra,
held to be the
law.

Statute of a
sister state
found in a
book pur-
porting to be
printed by its
authority, is
competent.

Statute of
Kentucky
making the
copies of the
laws of a sis-
ter state &c.
certified by
the secretary
of state from
the books in

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his office evi-
dence in our
courts.

of the courts, or before any judicial officer, of this commonwealth."

This shews that the legislature understood the rule to be, that the laws printed under the authority of a sister state, were evidence in our courts; and if they are not admitted as such, then the legislature has done nothing by the provision cited. For if the printed copy itself, from which the Secretary of state shall certify copies, cannot be read in evidence, then the copy certified by him cannot, and it is vain for him to certify any. But if the copies printed under the authority of a state can be admitted, then a copy certified by the secretary of state can be read also.

Powers of the
federal gov-
ernment, ex-
clusive and
concurrent
with the
states.

We are aware that there are powers vested in, and to be exercised by congress, which exclusively belong to that body, and are prohibited to the states. There are also concurrent powers between congress and the state legislatures, which, when exercised by congress, may become exclusive; but this power of a state admitting evidence of laws of a sister state, when not certified as the act of congress requires, belongs to neither class of these powers. It is not a prohibited power to the states by express provision. It is not concurrent, properly speaking, because no state can prescribe a rule of evidence in this particular for the Union, but only for itself in subordination to what congress may prescribe.

States of the
union may
admit as evi-
dence in their
courts of jus-
tice the pub-
lic acts of
each other,
without the
authentic-
ation required
by the act of
congress;
with such au-
thentication
they *must* be
admitted.

The provision was inserted in the constitution of the United States to secure to each state credit in its official acts as such, in the sister states; and to prevent any state from treating the others as aliens, by excluding their laws and adjudications, and again retrying controversies settled abroad. If then any state shall submit to the act of congress on the subject, and shall admit, and give due faith and credit to the public acts, records, and judicial proceedings, when certified as the act of congress requires, and shall also admit these same documents when certified in other modes, it is but rendering greater facilities in effectuating the purpose which the provision of the constitution intended. While, therefore, no state ought to, or can legally exclude any of these

documents, when certified according to the act of TAYLOR
congress, it may without any repugnance to the
laws of the union, admit the same documents verifi-
ed in other modes. Hence we conceive that if certi-
fied according to the act of congress they *must* be
admitted, and if certified or authenticated according
to state provisions they *may* be admitted without
contravening the laws of the union. This construc-
tion leaves the state government in possession of all
necessary powers for carrying on with convenience
and ease its intercourse with the sister states, while
it acts in perfect harmony with the paramount laws
of the nation. We, therefore, on principle, conceive
that the party in this cause was not bound up to pro-
duce the act of Illinois certified as the act of con-
gress requires, and that it was presented in this case
in a way which entitled it to be read, because so
much credit ought to be attached to that govern-
ment and its public printer, as to admit his copy of
the law as genuine.

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BANK OF IL-
LINOIS.

Judgment reversed, verdict set aside, and cause
remanded for new proceedings, not inconsistent with
this opinion.

Haggin for plaintiff; *Crittenden* for defendants.

Pool vs. Young.

CHANCERY.

Error to the Clarke Circuit; GEORGE SHANNON, Judge.

Case 123.

*Constitutional law. Mortgages. Remedy. Specific per-
formance. Practice in chancery.*

Judge MILLS delivered the Opinion of the Court.

October 15.

YOUNG filed his bill in equity against
Pool, to foreclose a mortgage, and force a sale of the
estate mortgaged to discharge certain debts secured
by the mortgage. Young's bill.

Pool answered.

Pool's an-
swer.

The account was settled, and the estate directed
to be sold, and was sold in pursuance of the decree;
and to reverse that decree, Pool has prosecuted this
writ of error. Decree and
sale.

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YOUNG.

Proceedings
and decree,
settling the
sum due, ap-
proved.

Where it was stipulated, in a mortgage made before the enactment of the relief laws, that on default of payment, the mortgagee might sell the estate for ready money, the chancellor, on being appealed to, after the passage of those acts, was bound to specifically enforce the contract, by a sale for cash in hand, whether those statutes were regarded as constitutional in other cases or not.

There is no question worth noticing arising in the progress of the case, or in settling the account. In all this, the court below seems to have decided correctly.

But the notes, which the mortgage was given to secure, were executed in 1819, and before the passage of the act of assembly which directed the sales of estates to be on a credit of two years, unless the complainant would accept notes on the Bank of the Commonwealth, in payment, and also required such estate to be valued before it was sold, and to bring at least three fourths of that valuation, if such indorsement was not made; and in this the court below refused to give such credit, and also refused to set aside the report of the commissioner, because such credit was not given, and such valuation made, and this is assigned as error. If this case was not one peculiarly circumstanced (as it really is) it would be sufficient for us to refer to the cases of *Lapsley vs. Brashear*, and *Blair vs. Williams*, 4 Litt. Rep. 34-47, to prove that, according to the settled course of decision in this court, the plaintiff in error would not be entitled to the credit of two years, secured by the act of assembly, because that the act in this respect, is in controvention of the constitution of the United States. But it is not necessary to rest on these decisions. They shew that the bare understanding, that the contract, when made under an existing law, includes that law in its composition, precludes the operation of such an act; but here, there is no necessity of implying such an understanding, for there is an express agreement between the parties regulating and fixing the remedy between them on the mortgage, if the estate should be sold for the purpose of raising the money due. Nor is it necessary to enquire whether the act requiring estates to be valued, and if they should not bring three fourths of that value, directing them not to be sold at all, comes within the principles recognised in the cases of *Blair &c. vs. Williams*, and *Lapsley vs. Brashear*, and is therefore unconstitutional so far as it operates upon contracts made before its passage. For the stipulation of the parties in this instance meets that case, and excludes the application of the valuation

act. In the condition to this mortgage is the following express stipulation.

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YOUNG.

"If the said Pool shall neglect or refuse to pay any or all of the sums aforesaid, as they become due to said Young, then said Young *may*, by giving twenty days notice at the public houses in the town of Winchester, in writing, proceed to sell to the highest bidder, *for ready money*, from time to time, so much of said land as will meet all deficiency of consideration money with interest and all costs, and the balance, after all is paid, shall be paid over to said Pool."

Now it will be seen that applying the act of indulgence by a sale for two years, unless bank paper was taken, or the valuation act either, will expressly and essentially alter and change these stipulations between the parties. Either of these acts incorporated with, and bearing upon their contract, would make it read, that instead of selling for *ready money*, Young should sell for bank paper, at a credit of three months, and for money at the end of two years, and if the property would not sell for three fourths of its appraised value in the opinion of commissioners appointed for that purpose, he should not sell at all. To admit a subsequent act of the legislature thus to modify and essentially vary the written stipulations of the parties, would concede to the legislature a power to make a new contract and destroy the old altogether; a power not assumed by the letter of the act itself; for it only professes to operate on general remedies.

The stipulation of the parties applies to the remedy and regulates it; fixes its terms and its credit, and what is to be taken in payment and provides for an unconditional sale, without any fixed value, except so much ready money as the estate would bring. It was competent for the parties to make such a contract. There was no law forbidding it, when it was made. It was then both fair and legal. How then can a legislature change the words, sense and substance of the agreement? It is true that Young did not himself attempt to execute this stipulation without the aid of a court of equity; but this was

Such stipulations of the parties fixing the remedy for a breach of their contract, governs the chancellor, as the law of the case.

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to the benefit of his adversary, who now complains. The application to the chancellor was made, not only to subject the estate mortgaged, but to do it as agreed, and to specifically enforce the agreement by applying the conventional remedy for a breach. In such a case, it was proper for the chancellor to decree the contract specifically as the parties made it at its date, and not as the legislature made it afterwards, as the plaintiff in error now contends.

Where the chancellor has no jurisdiction of the original demand, he can only order a sale of the mortgaged estate, and the creditor must go to law for any balance that may remain.

In cases to enforce a lien for the purchase money, the chancellor has original jurisdiction.

Another question is made by the assignment of error, which is of more weight. The court not only subjected the estate to the satisfaction of the mortgage, but decreed the full and positive amount of the notes to be paid absolutely, and afterwards, as the property when sold did not amount to enough to satisfy the debts, directed by a decretal order, that execution should issue for the balance, as on a judgment at common law. According to the settled law of this court, the chancellor has no jurisdiction of legal demands secured by mortgage, *further than to subject the estate to the demand, and the party must resort to his legal remedy for the balance.* Cases where the chancellor has exclusive jurisdiction of the demand secured by the mortgage, or where he has concurrent jurisdiction with a court of law, are exceptions to this rule, within which the case of the complainant here cannot be brought. *The notes secured by the mortgage were executed by Pool to Silas W. Robbins, and by him assigned to Young, and then Pool executed to Young this mortgage to secure these notes.*

It is true, that the mortgage recites that the land mortgaged was purchased by Pool of Robbins, and that the notes in question were given for the same land. But that Robbins retained any lien upon this land which was secured or confirmed by the mortgage to Young, is not suggested in the bill or claimed by it; so that this bill is not to enforce either an equitable lien, or to enforce specifically a contract for land, which are circumstances conducing to give a court of equity jurisdiction. For any thing that appears, the case is circumstanced as it would be, if Pool had mortgaged any other tract of land to se-

cure the debt, and there is nothing to exempt it from the general rule.

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vs.
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All that part of the decree therefore directing the sale of the land, and confirming it, is affirmed; but all that part which decrees the balance, and directs an execution for it, must be reversed with cost, and the cause remanded, with directions to the court below, to direct by a decretal order, credits on the notes for the sum raised by the sale of the estate, after deducting therefrom the cost of the suit in that court.

Decree reversed as to the sum due in personam.

Monroe for plaintiff; *Taul* for defendant.

Castleman vs. Homes; Same vs. Cox; Same vs. Farrar; Same vs. Nichols---and Dallam vs. Homes; Same vs. Cox; Same vs. Farrar; Same vs. Nichols.

CHANCERY.

Eight cases of writs of error, to the Fayette Circuit; *JESSE* Case 124. BLEDSOE, Judge.

Writs of error. Statutes. Reorganizing act. Parties. Practice in this court.

Judge MILLS delivered the Opinion of the Court.

October 16.

THE Fayette Paper Manufacturing company was incorporated by act of assembly, and a clause inserted in the charter, that all stockholders at the date when a debt was contracted, should be bound individually for the debts, in case the company failed.

Charter of the Fayette Paper Manufacturing Co.

The company became insolvent, and Samuel Farrar, Joseph Nichols, Elizabeth Cox and Robert Holmes, each having obtained judgments at law, in which unsuccessful executions were prosecuted, brought their several bills in equity against the stockholders, and obtained their several decrees for the proportion of their debts against each stockholder, and a joint decree against all for costs.

Judgment against the corporation; bill against the stockholders; and several decrees against them for their respective portions; joint decree for costs.

To reverse each of these decrees, David Castleman, one of the stockholders, issued his several

Several writs of error by the stockholders.

CASTLEMAN
&c.
vs.
HOLMES &c.

writs of error against the respective complainants, and William S. Dallam also issued his four several writs against the same parties.

Cases transferred from the *new court* to this, by the act of Jan'y, 1827, have the same rules applied to them here, as though they had originated in this court.

Each of these writs however, if writs they can be called, were issued, not from the Court of Appeals, but from the tribunal which was erected by the act of assembly, styled the reorganizing act, usually called the new court. On the demolition of that tribunal, these records were brought into this court, and placed on this docket by act of assembly (4 Monroe IV) to be tried as other cases brought here, and we conceive that it is not competent for either Dallam or Castleman, to prosecute several writs of error, to reverse these decrees.

In case of a decree in one suit, against a number of defendants, directing them severally to pay a certain sum each, and ordering them all jointly to pay the costs, the writ of error must be joint by all the defendants; one cannot maintain it.

Without leaving it to be inferred that we admit that either of these writs in their origin were of any validity, we suppose the correct meaning of the act of assembly which brought the causes here, to be, that they should stand in the same situation, and have the same rules applied to them, as would be applied if they had been *originally brought here*, by writs of error precisely similar to the process by which they were brought in the New Court. So that although the causes are brought here by act of assembly, and not by writ from this court, they should be heard or disposed of exactly as if there were such writs. Any rule, therefore, which would prevent the causes being heard on the merits, if these were valid writs of error, ought to prevent us from trying them as they stand.

Writs of error may be amended, by adding or striking out plaintiffs or defendants. But—

Where the defendants in the court below have sued out their several writs of error, and the causes

The decree for costs in each of these cases is joint, and this requires a joint writ of error, even if the other parts of the decrees were several, which is not admitted. But such writs ought to be quashed unless they can be amended. It is true, the law as it stood when these suits began in the new court, did allow, as it yet does, amendments in writs of error, by inserting either plaintiffs or defendants. But who in this case shall amend? Shall it be Castleman, or Dallam? It might be a dispute between them, not easily settled, which should dismiss and pay costs, and which should save his suits by amendment. But suppose that these two plaintiffs in error could

adjust that matter, we do not conceive ourselves bound to propose to them the negotiation. Moreover ought they to be allowed to make such a treaty without making the defendants in error a party thereto? Have they not as good a right to elect which writ should stand, and which be dismissed, as their interest are affected by either, as the opposite party? Or rather, as both writs are wrong, and each would have an equal right to amend, and both cannot amend, we conceive that the defendants have the right to insist upon the disposition of both writs without waiting for terms to be made between the two plaintiffs, or being bound to look for the costs to which ever of them these terms should point out. Each suit of the whole eight, as they are not brought in a way in which the merits can be tried, must therefore be dismissed, by separate orders, with costs.

CATTLEMAN
&c.
vs.
HOLMES &c.

have been heard, the court will not inform them of the defect, and invite them to unite in one, and dismiss the other, but will dismiss both writs.

Wickliffe for plaintiffs; *Chinn* for defendants.

Kay vs. Fowler &c.

CHANCERY.

Error to the Fayette Circuit; JESSE BLEDSOE, Judge.

Case 124.

Usury. Answers. Statutes. Practice. Commissioners in Chancery.

Judge MILLS delivered the opinion of the court.

October 21.

KAY, the plaintiff in error, placed in the hands of Benjamin Stout divers sums of money to be loaned by him as a broker; and among others, John Fowler became a borrower at different times, at the rate of two per cent per month and the half of one per cent during the same period as commission to the broker, making, generally, the rate of thirty per centum per annum. Fowler at each time of his borrowing, gave a note including usury at the foregoing rate, till the note arrived at maturity, and then renewing it, and compounding the usury at each time. Kay at last took charge of the matter himself, instead of his broker, and, after that, Fowler seems to have been relieved from the one half of one per cent per month, the broker's commission. The notes were consolidated ultimately,

History of
the usurious
transactions.

KAY
vs.
FOWLER & C.

and also swelled by additional loans, and after renewed, compounding legal interest in the notes, and including the usury in a separate note. The last of these renewals was after the passage of the act of assembly which allows a usurer to recover his debt and interest, and to forfeit nothing except the usury, and makes all usurious contracts valid except as to the usury.

Mortgage by
Fowler.

To secure this, with other debts, Fowler executed a deed of trust to Thomas Bodley, Cornelius Coyle and Thomas Fletcher, for sundry tracts of land and slaves.

Kay's bill to
foreclose.

Kay filed this bill against Fowler and his trustees, to subject the trust estate to the demand.

Fowler's answer, and interrogatories to Kay.

The answer of Fowler and the trustees set up the usury as a defence, and also sundry payments made by Fowler, and inserts interrogatories in their answer, to which Kay responds.

Question as
to the sums
advanced
and repaid.

The great difficulty which occurred in the cause was to ascertain by accurate calculation, the amount of debt and legal interest really due, cleansing the transactions from usury, and applying the payments at a proper period. For it does appear that from the exhibits, the neat amount loaned, and time when loaned, may be ascertained, as well as the dates of payment and sums paid.

Kay's answer
held evasive,
and not amounting to
denials.

In this process, however, the answer of the defendants in nature of a cross bill, the exhibits and depositions must be relied on. The answer of Kay to the cross bill affords but little aid. For in the accustomed mode of usurers, he is certain that the debt claimed is due, though he remembers to forget for what it is due, or what it is composed of, whether of money actually loaned alone, or of that and promises of large sums for forbearance. Prospectively he sees the way of recovery very clear before him, but he cannot retrospectively look back, and detail the variations and changes, and increase and diminution of the debt. There is darkness and forgetfulness on his side, so that his answer can be said to be a denial of almost nothing.

To aid in this process, a commissioner was appointed and reported. His report was recommitted, and he reported again. This report was disregarded, and another commissioner was appointed, who reported, and by his calculation shewed the debt to be all discharged, and a balance due to Fowler. He made also at the request of counsel, two other reports and calculations, by which he brought Fowler in debt considerable sums, at each time.

KAY
vs.
FOWLER &c.

Commission-
ers' reports.

The court below ultimately adopted the first of these three reports made by the last commissioner, and decreed a balance to Fowler; to reverse which Kay has prosecuted this writ of error.

Decree of the
circuit court.

Much of the difficulty has accrued by a failure of the chancellor to do his duty in the court below. He has adopted a course on which we have frequently had occasion to animadvert in other cases, but which we seem not very successfully to correct. He did not look into the cause and settle its principles, first, as a guide to the commissioner, leaving to the commissioner the details of calculation according to the directions of the decree which would operate as his guide. Instead of this, he has sent the cause each time to the commissioner, without any directions, leaving the commissioner to operate upon, and guide the court, and to make a number of experiments, until one should satisfy the chancellor. The commissioner was thus to settle principles, and make the calculations in his own way first, and thus relieve the court from the burden of looking into the cause, and become substantially the investigator of the equity of the parties, subject to the veto of the chancellor, or by different experiments leaving the the chancellor, the election, of which he pleased.

Before refer-
ring a cause
to a commis-
sioner, the
court ought
to settle the
principles on
which he is
to make up
the account.

From this mode of operation, it has turned out that not one of the reports in the cause, conforms to the equity and law of the case, although one of them is chosen as the basis of the decree rendered.

This imposes upon us the necessity of bringing back the cause to the point at which it stood before it was referred to a commissioner at all, and of settling the necessary principles which shall operate as

Practice in
this court.

KAY
vs.
FOWLER & C.

a guide to the commissioner which may be hereafter appointed.

Where the usurer has renewed his securities, after the passage of the act for his benefit, of Feb. 1819, he is entitled to recover principal and legal interest, and loses but the excessive interest.

Mode of calculation, and of ascertaining the sum due on an usurious transaction, of numerous advances, payments, renewals and compoundings.

Mandate.

Much usury was due before the passage of the act relieving from a forfeiture of the whole debt and legal interest, but as both the note and mortgage is posterior in date to the act, and this according to the adjudications of this court, gives Kay the right of recovering his debt and legal simple interest thereon from the date of the several loans, till he is paid.

It will be necessary that the simple amount loaned at each time, shall be ascertained, and this ought to be the amount of each note, excluding therefrom interest legal or illegal. On this sum so loaned, simple interest is to be calculated, disregarding all renewals, or consolidation, till the time the calculation is made, and then applying the payments when made, first, to the interest due, and then the balance to the principal, and the sum thus found due, from either party, ought to be the amount of the decree, and if for Kay ought to reach the mortgaged estate. It will be found on examining each of the reports, not one pursues this simple process. Some compound the legal interest, and one at least sinks the principal by usury not paid. According to this mode, all payments for usury or interest, must be credited, as payments when made.

The decree of the court below, must therefore be reversed, with costs, and cause remanded, with direction, that such proceeding shall be had, as shall conform to this opinion, and the rules and usages of a court of equity.

Haggin and Combs for plaintiff; *Chinn, Cowan and Crittenden* for defendants.

Nantz, Stewart &c. vs. McPherson. CHANCERY.7th 597
121 608

Error to the Logan circuit; HENRY P. BROADNAX, Judge. Case 125.

Pleading in Chancery. Vendor and vendee. Notice to purchasers. Bill pro confesso. Admissions. Cross bills. Parties.

Judge MILLS delivered the Opinion of the Court.

October 22.

SAMUEL H. CURD, being seized of a tract of land, sold and conveyed it to William Stewart; Stewart sold and conveyed it to William Harrison, who sold and conveyed it to Thomas W. Nantz, who filed this bill, setting forth the aforesaid title, and alleges that Evan McPherson also sets up title to the same land by a conveyance from the same Samuel H. Curd, and asserts title thereto by virtue of Curd's deed; represents his own as superior in both law and equity, and by thus slandering his, the complainant's title, destroys its value, and prevents his selling of it, although he has the possession. He makes McPherson defendant, and prays that he may be compelled to disclaim or relinquish his title.

Bill of Nantz, holding the legal title and possession, against McPherson, asserting claim, for a release.

McPherson answers, and admits that he holds a deed from Curd, for the same land; insists that his equity was prior to the claim of the complainant, derived through Stewart and Harrison from Curd, and also charges that he obtained a conveyance from Curd, which was deposited in the office to be recorded, but was lost before it was recorded, and then Curd executed his present deed which is recorded; and he charges that Stewart and Harrison deluded Curd into executing their deed, he not believing it was the same land, and that he would not have executed it, had he not been defrauded into the measure. He also charges that Stewart, Harrison and Nantz, each had full notice of his equity before either of them received their respective titles, or paid the purchase money, and also that his present deed was in fact executed before the deed of Curd to Stewart, and that the latter deed was antedated before his conveyance from Curd, and that all their acquisition of title was a combination to defraud him out of his land. He makes his answer a

McPherson's answer and cross bill.

**NANTZ &c.
vs.
McPHERSON.**

cross bill, and makes Nantz, Stewart, Harrison and Curd defendants thereto; prays for a release of the complainant's title; and if that cannot be granted, that a decree for the value of the land may be rendered in his favor, against Harrison, Stewart, and Curd.

Cross bill
taken for
confessed a-
gainst Curd,
Stewart and
Harrison.

Harrison, Stewart and Curd, never answered this cross bill, although served with process, and it was taken for confessed against them.

Answer of
Nantz to Mc-
Pherson's
cross bill.

Nantz answered, denying that at the time of his purchase he had any knowledge or intimation whatever that McPherson had any claim; but admits that a short time before he received his conveyance from Harrison, in a conversation with McPherson, he was informed that he, McPherson, had a claim to the land, and that he had purchased it from Curd, and he immediately stated this fact to Stewart, under whom Harrison, his immediate vendor, held, and that Stewart assured him that the conveyance of him, Stewart, from Curd, was prior to the conveyance of McPherson; and to prove that fact, referred him to the county court office, where the two conveyances from Curd to Stewart, and from Curd to McPherson, were recorded, and that on searching there, he found that Stewart's statements were true. He denies any knowledge of any bond for the conveyance from Curd to McPherson, or that he had a prior deed executed, which was filed in the office and lost. He says he cannot admit that the deed of Stewart was antedated, and that Stewart had no right at the date of the purchase of McPherson. He alleges that he is a *bona fide* purchaser from Harrison, and has paid the consideration.

Nantz's cross
bill against
Harrison.

He, Nantz, prays that Harrison may be a defendant to his answer, and that if he loses the land, Harrison may be decreed to refund to him the price paid, with interest. But on this answer he took no steps against Harrison, and never served process on him.

After the cross bill of McPherson was taken as confessed against Curd, Stewart and Harrison, and before the hearing, Nantz entered on record, the following admission:

"Thomas W. Nantz does not object in this case to the answers of Stewart and Harrison being read as evidence against him, nor does he object to the confession of said McPherson's cross bill against said Stewart and Harrison, by their failing to answer, being read and taken as evidence against him; but waives that rule of law which excludes it.."

NANTZ &c.
vs.
McPHERSON.

Admission of
record by
Nantz.

No depositions were taken, except one or two, proving Nantz to be in possession of the land.

The court below decreed that McPherson should release and convey his title to Nantz, and that Curd, Stewart and Harrison, should pay the value of the land to McPherson, because they had fraudulently got the title from him. This value was ascertained by a jury, and decreed accordingly. To reverse this decree, Nantz, Curd, Stewart and Harrison have prosecuted their writ of error.

Decree of the
circuit court.

To make the
plea of a *bona
fide* purchase
without no-
tice, availa-
ble, the no-
tice, before
the whole of
the purchase
money was
paid and con-
veyance re-
ceived, must
be positively
denied.

Assuming the fact to be, that McPherson had a good equity for the land, it would be difficult to screen Nantz from the effect of notice of that equity, under the admissions of his answer.

The make the plea of a *bona fide* purchase without notice, available, the want of notice must be denied positively, and the person pleading it must have completed his purchase by paying *all* the consideration, and receiving his conveyance.

Such infor-
mation as
would put a
prudent man
on the search
for the truth,
is sufficient
notice.

If, before either of these events, he has received such information as would put a prudent man upon a search for the truth of the case, he will be affected by it, and his plea must fail. Here Nantz admits that he did enquire, on receiving the information from McPherson, and that his enquiry ended in ascertaining, by the directions of Stewart, that the conveyance under which he held was prior in date to the conveyance of McPherson.

But there is something more dangerous to Nantz than a mere equity. The fact is charged, that the conveyance of Stewart was antedated so as to overreach that of McPherson, which in fact was prior in point of time. Although Nantz claims under this conveyance from Curd to Stewart, yet it was exe-

One having
the elder le-
gal title may
have a decree
for a release
against ano-
ther having a
conveyance

NANTZ &c.
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McPHERSON.

from their
common
grantor of
elder date,
but in fact
subsequently
executed.

Consent by
one defend-
ant, that the
confession of
a co-defend-
ant, by his
failure to an-
swer, may be
read and tak-
en as evi-
dence against
him, is an ad-
mission of the
allegations of
the bill so
taken for
confessed.

Evidence.

Complainant
compelled, on
defendant's
cross bill, to
release the ti-
tle and sur-
render the
possession of
the land.

Mandate.

cuted before he had any knowledge on the subject, and he does not pretend to have any. If the fact that this deed of Curd to Nantz is the eldest, be true, then Nantz will be affected by it, whether he knew it or not. It would give to McPherson the eldest legal title, and entitle him to a release of that which appeared to be the oldest, but in truth was not.

This leads us to inquire what is the effect of the admission on record, that the silence of Stewart and Harrison may be used as evidence against him. As to Stewart and Harrison, without this admission, the facts must be taken as concluded that McPherson has the oldest equity, and also the oldest legal estate, and that the conveyance of Stewart is younger than that of McPherson. The admission of Nantz therefore can be nothing less than permitting these facts to bear against him as if proved.

And this subjects Nantz to a decree compelling him to surrender his apparent legal estate. We shall remark, that the deed to Stewart from Curd, though placed on record by acknowledgment, was not acknowledged before the clerk for several months after its date, and no witnesses thereto appear on the deed; so that the conveyance to McPherson comes in between its date and acknowledgement, a circumstance not unfavorable to the fact of its being antedated.

It follows, then, that instead of McPherson being compelled to surrender his title, Nantz ought to be compelled to surrender his, with the possession of the land, and that the decree against Curd, Stewart and Harrison, is erroneous; and Nantz must be left to pursue Harrison, and his preceding warrantors, at law, especially as he has not brought them before the court, in such an attitude as to obtain a decree against them or either of them.

Decree reversed with costs, and cause remanded with directions to enter up a decree in the court below, in conformity with this opinion.

Crittenden for plaintiff; *Mayer* for defendant.

Wood vs. Coghill; Prather vs. same; Hill vs. same; Rutton vs. same, and McKibbin vs. same. SCIRE FACIAS.

Error to the General Court; HENRY PIRTLE, Judge.

Case 126.

Ejectment. Precedents of writs. Scire facias. Amendments. Mandates.

Judge MILLS delivered the Opinion of the Court.

October 25.

THESE are all writs of *scire facias* brought to revive judgments in ejectment, so far as the said judgments operate upon the possession of the land, and not the judgments for costs. All the writs are precisely alike, except the variation made by the names of the parties, and the different judgments. Writs of scire facias, for executions on judgments in ejectment.

The court below gave judgments reviving the former judgments, by default, and directing executions. From each, the defendants have appealed, and assign for error that the *scire facias* are defective, because none of them recite or state the term yet to come as laid in the declaration, for which the plaintiff below now claims execution. This defect must prove fatal to each writ. Scire facias to revive a judgment so as to obtain the writ of habere facias, must shew the term recovered.

By examining the most approved forms which are evidence of law, it will be found that in a *scire facias* of this nature, the term is always recited and set out, and the most modern forms still retain the same requisite, as will be seen by consulting the appendix to the late treatise of Adams on ejectment. If such a recital was preserved in ancient forms, while the party who issued a *scire facias* must also file a declaration before he could have judgment that he may have execution, it certainly cannot be less a requisite now, when according to an act of assembly of this state no declaration is necessary, and the writ must not only supply the place of a writ, but also that of the declaration. Precedents of writs evidence of the law.

But this is not a requisite of positive law only, resting on authority without reason to support it. It is a well settled principle that a judgment in ejectment, so far as the possession of the land is concerned, can have no operation or effect longer than till judgment for There can be no habere facias after the expiration of the term; nor judgment for

WOOD &c.
vs.
COGHILL.

such an execution.

the expiration of the demise; and when the demise expires, no further execution, as to the possession of the land, can ever be had. It is therefore right that he who attempts to revive a dormant judgment in ejectment should shew that there was something to be revived; and that there was part of his term yet remaining for which he asks execution, in order that the court may see that he has really an existing right to enforce by the remedy of *scire facias*; and it would be hazardous to render a judgment reviving when there might, for ought that appears, be nothing to revive.

Mandate to quash the writ, not to amend.

The judgments by severeral entries must be reversed with costs, and the cause be remanded with directions to quash each *scire facias*, with costs.

Crittenden for appellants; *Triplett* for appellees.

CHANCERY

Smith and wife vs. Maxwell's heirs.

Case 127.

Error to the Warren Circuit; HENRY P BROADNAX, Judge
Guardians. Mortgages. Dower. Disclaimer. Distribution. Decrees. Security.

October 25. Judge MILLS delivered the Opinion of the Court.

Guardian of infant distributees purchasing a slave testator had mortgaged, holds him for them, subject to the payment of the mortgage money and interest.

Such guardian being the widow of the testator, after having disclaimed the right to hold the slave so

It seems to the court that the right of redemption to the slave held, must, and did enure to the benefit of the estate of David Maxwell, deceased. when purchased by his widow, and that said slave is subject to distribution as part of the estate, allowing to the widow of the deceased, who was guardian of the children, the price paid for the equity of redemption with its interest, whenever she and her present husband shall be impleaded and called upon by a proper bill for that purpose, to settle up said estate.

And that said defendants below, the widow who was guardian, and her present husband, having denied, and disclaimed the right of holding said slave as dower, cannot hold him as a dower slave, or as claimed in their answer, in their own right, but must be held to hold him as in her capacity as guardian.

And that this bill cannot be sustained as a bill to

settle up the account of hire of Ned, without settling up the whole guardian's accounts, and of course that the decree for hire is erroneous.

SMITH & ux.
vs.
MAXWELL's
heirs.

And all the relief to which the complainants can be entitled, is a security that the slave shall remain and be forthcoming for distribution, and as the defendants have claimed the absolute right of the slave, the chancellor who will control the conduct and management of guardians, ought to decree the title of the slave to the complainants, and to forever enjoin and restrain the defendants from removing or disposing of him, and to take the possession of the slave from the defendants, and cause him to be hired out, and managed by a commissioner and receiver, appointed under the control of the court, from time to time, unless the defendant Smith, husband of the widow, shall enter into bond with security, appointed by said court, to have said slave forthcoming at the time of distributing said estate among the complainants, and to account for his past, and future hire, in settling the accounts as guardian.

purchased as
dower, can-
not hold him
as such, but
must hold as
guardian.

Bill not main-
tainable for
distribution
in part.

Decree di-
rected against
defendant's
claim as ab-
solute owner,
and that she
holds as guar-
dian, and
give security
that the slave
be forthcom-
ing.

Decree reversed with costs, and cause remanded with directions for such decree and proceedings as shall not be inconsistent herewith.

C. S. Bibb for plaintiffs; Barry and Depew for defendants.

Davis vs. Ballard.

CHANCERY.

Error to the Madison Circuit; GEO. SHANNON, Judge.

Case 128.

Mistakes. Amendments in this court. Injunctions. Damages. Statutes.

Judge MILLS delivered the opinion of the Court.

October 27.

THIS case was heretofore decided in this court; and the mandate then sent to the court below, directed that court to render judgment in favor of Davis, for the ten per centum damages given on the dissolution, by act of assembly.

Decree of the
circuit court
for perpetual
injunction,
reversed here,
and mandate
for damages.

In obedience to this mandate, the court below made an entry, simply directing Davis to recover the "damages mentioned in the opinion" of this

Decree of the
circuit court

DAVIS
VS.
BALLARD.

for damages,
without specifying the
amount, or
on what sum.

Facts of the
case.

Mistake in
an opinion of
this court, ordering damages where
none were recoverable,
might probably be corrected at a
subsequent term, as a clerical mistake.

Where the final decree of the circuit court, awarding a perpetual injunction against a judgment at law, is reversed here, the damages are recoverable though there had been no previous injunction.

Mandate.

court, and refused to render a decree for ten per cent. on the amount of the judgment at law, because it appeared by the record in the court below, that no injunction bond had ever been entered into, and no original injunction, at the commencement of the cause, had ever issued. Thus the decree for damages, in obedience to the mandate of this court, was made so uncertain, that it could not be ascertained thereby what sum in damages was to be recovered. To remove this uncertainty, and to ascertain the damages to be recovered, Davis has prosecuted, against Ballard, this writ of error.

The decree of the court below, refusing to specify the damages recovered, is erroneous. We do not place the right of Davis to recover damages on the ground that the mandate of this court has directed damages, though by mistake; that the term is over, and it cannot be now corrected. For such a mistake in the entry in this court, might probably be held a clerical mistake, and be corrected by the record, which would afford enough to amend by.

But by examination of the original decree which was reversed by this court, it will be perceived that, by its terms, a perpetual injunction was awarded to Ballard, and by the reversal, that injunction must consequently be dissolved. We do not deem it material whether the injunction issued at the commencement of the suit, or during its progress, or at its final termination. If it is an injunction upon a judgment at law, for money, and has to be dissolved, it is within the act of assembly, and is as completely embraced as if it had been issued at the origin of the suit. The mandate of this court was not a mistake, but was correct, and ought to have been obeyed in the court below, by rendering a decree for ten per centum damages on the amount enjoined by the perpetual injunction, awarded by the final decree, which was here reversed.

Decree giving damages reversed with costs, and cause remanded, with directions to the court below to render a decree for ten per centum damages, on the judgment at law.

Caperton for plaintiff; Turner for defendant.

Dicken vs. Griffith.

EJECTMENT.

Error to the Daviess circuit; ALNEY McLEAN, Judge.

Case 129.

Arbitrement. Submission. Awards. Ejectment. Record. Judgments.

Judge MILLS delivered the Opinion of the Court.

November 27.

THIS is an action of ejectment, brought by the nominal plaintiff, on the several demises of Remus Griffith, Elizabeth Dorsey, Archibald Dorsey and Nicholas Dorsey, and John Baker. The demise of Archibald and Nicholas Dorsey is both joint and several, and they all express different quantities of land, some 500 acres, some 1500, and others 3000 acres.

Demises of the several lessors.

The tenant in possession, Christopher Dicken, on whom the notice was served, caused himself to be entered defendant; and at a subsequent term an order read:

Tenant in possession made defendant.

"This day came the parties, as well by their attorneys, as in their proper persons, and the parties mutually agree to submit all matters of difference between them, in this suit, to the final arbitration and determination of Alney McLean, Benjamin Field and William Newton, or any two of them, and agree that their award thereupon be made the judgment of this court."

Submission to arbitrement.

These arbitrators returned an award which professes on its face to be made in the ejectment depending, wherein Remus Griffith was plaintiff and Christopher Dicken, defendant, and omitting its recitals and formal parts, it reads thus:

"The parties agreed to submit their papers to us, without any proof of their execution, and any other proof, and we having examined the same, are of opinion that Remus Griffith is entitled to all the land contained in John Dicken's deed to Travis, except that part conveyed by the commissioners to James Jordan; and that Christopher Dicken is entitled to all that part of the land conveyed by the commissioners to James Jordan; and as some doubts may exist as to the legality of the commissioners' deed, we award that the said Remus convey by deed,

Award.

DICKEN
vs.
GRIFFITH.

of special warranty, to said Christopher Dickea, the land included in the said commissioners deed, and we award that each party pay their own costs."

Exceptions
to the award.

On the return of this award, the defendants excepted to its being made the judgment, particularly because it was uncertain, indefinite, and beyond the terms of submission, and did not conclusively settle the controversy between the parties. There were other exceptions, some of them touching matters of fact; but as none of the evidence on these points, on which the court acted is contained in the bill of exceptions, we cannot further notice them.

Award sustained, and judgment for plaintiff.

The court overruled the exceptions, and gave judgment, "that the *plaintiff* recover against the defendant, his term yet to come, in and to the land contained in the deed of John Dicken to Travis, as specified in the award, and on the motion of the plaintiff, the commonwealth's writ of *habere facias possessionem* was awarded him."

Griffith tenders a deed to perform the award on his part.

Then follows an entry, that *Remus Griffith* exhibited in court a deed of conveyance to Christopher Dicken, in pursuance of the award, conveying to him the land in the commissioners' deed, specified agreeably to the above award, "which was acknowledged and certified to the county court."

Exception to the decision of the circuit court, and assignment of error.

The defendant excepted to the opinion of the court, and has prosecuted this writ of error; and now assigns as error the same objections to the award, and that it did not warrant the judgment of the court rendered thereon.

Expression of an opinion by arbitrators in their report, not taken as an award.

It would be difficult, by any course of reasoning known to us, to sustain the judgment of the court on the award, that the plaintiff recover all the land in the deed referred to.

The arbitrators give it as their *opinion* that *Remus Griffith* is entitled to it, but they do not award to him the recovery thereof. He might have been entitled to it, but the tenant might not have been guilty of any trespass thereon, and disputed that title, and therefore the plaintiff would be entitled to no judgment for it.

It will also be difficult from the face of this record, and terms of submission to sustain that part of the award, which directs a conveyance of part of the land to be made from one party to the other. The ejectment itself could not enforce such a measure, nor was such a matter in controversy.

But there is a paper copied into this transcript, purporting to be signed by Griffith and Dicken, and enlarging the terms of submission, and defining the powers and duties of the arbitrators. But this paper does not purport to be the act of any of the lessors but Griffith, and cannot therefore be taken as applying to all the controversies in this suit.

Besides, there is no evidence that this paper was ever filed, much less that it was entered of record. It was therefore improperly copied by the clerk, to swell the bulk of the record, and increase his fees, and we therefore cannot notice it as having any bearing on the case.

The act of assembly concerning awards, requires that the record should shew the points of controversy, and of course the award should include within it, the matters in contest and no more; and be certain enough to make the judgment pleadable in bar. If there be legal pleadings *they* shew the controversy; if there be no pleadings, they may be supplied by a statement shewing the claims of, and the dispute *between*, the parties. To these pleadings or statement we must look for what is to be decided. If the award reaches the whole controversy, then it is final. If it falls short of this, it is defective. If it exceeds it, it is usurpation, which cannot be sustained. Taking this rule to test this award by, and it cannot be sustained.

By the declaration and plea, the real point in issue was, whether the lessors of the plaintiff, or either of them, could on the day of the demise laid, or before action brought, make such a lease, as is alleged in the declaration, of the premises described in the declaration, or of any smaller quantity, and whether the tenant or defendant by entering or residing on the land, had disturbed this supposed

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Submission of an action of ejectment will not authorize an award that one party convey a part of the land to the other.

An agreement by one of the lessors, extending the terms of submission, not binding on the others, and consequently cannot embrace all the controversy.

Such a paper found in the transcript, but not part the record, is nought.

Requisites of a submission by order of the court, and of the award.

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GRIFFITH.

lease. To try this, the collateral question of title in the lessors of the plaintiff, or either of them, was in issue.

Points put in issue by the general issue in the action of ejectment.

It was necessary therefore, that an award to respond to this controversy should in substance shew that the lessors of the plaintiff, or one of them, had title, and that the defendant was guilty of disturbing the possession of and in the premises in the declaration mentioned.

Requisites of the award in such case.

An award in an action of ejectment, that one of plaintiff's lessors has good title to part of the land in a certain deed, and that he convey the balance to defendant, is not valid.

Judgment on such an award, that plaintiff recover his term &c. not warranted.

Mandate.

Whether the title or possession of these premises have been considered by these arbitrators, is not left even to inference, but conjectured only. A certain deed held by one of the lessors of the plaintiff is supposed to be good for part of the territory therein described, and doubtful as to the residue, without any enquiry into the possession. No determination is made that the lessor shall enforce this supposed good part of his title against the possession of the defendant, but that the lessor shall make the doubtful part of the defendants title indubitable. The award has, therefore, *in one point, fallen short of* the matter in controversy, and exceeded it in another, and the court by endeavoring to enforce it by judgment, when there was nothing to enforce, has been driven to enter judgment for a portion of the land contained in a certain deed, not known in the record, instead of rendering it for the possession of the premises in the declaration mentioned, or any part thereof. The award ought not to have been permitted to stand.

The judgment must be reversed with costs, and the cause be remanded with directions to to quash the award, and to proceed with the cause in a way conformable to this opinion, and the law of the land.

Talbot for plaintiff.

Peebles vs. Porter & Co.

COVENANT.

Error to the Mason Circuit; W. P. ROPER, Judge.

Case 130.

Demurrer to evidence. Pleading. Leave to give special matter in evidence. Conditions precedent. Practice. Mandates.

Judge MILLS delivered the opinion of the court.

November 27.

NORMAN PORTER & COMPANY, a firm of Philadelphia, brought their writ, in covenant, against Theophilus Page & Co. composed of Theophilus Page and Robert Peebles, a copartnership of Maysville in this state. The writ was executed on Peebles only, and returned "no inhabitant" as to Page, by which it abated.

Parties to the action.

The plaintiffs declared on a covenant, the stipulations of which, in substance, were, that they, the plaintiffs, should transport and deliver, by a specified time, eighteen boxes of tin, at the store of Messrs. January, Winans and January, commission merchants in Maysville, and within three months thereafter, eighteen boxes more; at the expiration of the next three months, eighteen boxes more, and at the expiration of three more months, the last and fourth quantity of eighteen boxes; and that on the delivery of each of these parcels, or number of eighteen boxes each, Page & Co. stipulated to execute their note of hand, payable at the branch bank of Washington, Kentucky, within five months from the date, for four hundred and sixty-eight dollars, the price of each parcel of boxes. They then averred the delivery of each parcel of boxes, at the place and times specified, in as many several averments, and assigned breaches in the defendants' not executing their notes at each time, as stipulated.

Declaration.

The defendant, Peebles, by his plea, which the clerk says *was ordered to be filed* (instead of simply noting the fact that it was filed, which is the only proper entry) alleged the performance of the covenants in full, and concluded to the country; to which the plaintiffs filed their joinder, and then annexed this agreement or note, signed by the plaintiff's counsel:

Plea, and agreement that special matter may be given in evidence signed by plaintiff's attorney.

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"The special matter which could be legally specially pleaded, may be given in evidence."

At the final trial, which is the only part of the record which we need to notice, the plaintiffs gave in evidence the covenant declared on, precisely corresponding with that recited in the declaration, and then closed their proof.

Demurrer of defendant to the evidence.

The defendant demurred to the evidence, and the plaintiffs joined in demurrer.

Conditional verdict.

The jury found a conditional verdict, of the price of the whole quantity of tin in damages, if the law on the demurrer to evidence was for the plaintiff, and for the defendant if the law was for him.

Judgment for plaintiff.

The court below rendered judgment for the plaintiffs, to reverse which this writ of error is prosecuted.

Party holding the affirmative cannot demur to his adversary's evidence.

If the demurrer to evidence is to be considered with regard to the issue *made up in the cause* by the plea alone, then the judgment of the court is right; because by that issue the defendant took the affirmative, and was bound to adduce all the evidence on his part, when he adduced none. Besides, a demurrer to evidence on the part of him who holds the affirmative of the issue, is absurd in itself, and ought not to be allowed.

Leave, on the issue of covenants performed, that "the special matter which could be legally pleaded, may be given in evidence," puts the plaintiff on the proof of the performance of a condition precedent—

—Such leave has the effect

The question must therefore rest on the permission to give any special matter in evidence which might have been pleaded in bar. To give this agreement or permission no effect, would be disregarding the intention of the parties and overturning the established understanding of a practice well known; oftentimes subserving the purposes of convenience, and always the ease or indolence of counsel. The question then remains, what is the effect to be given to it? Ought it to be construed to include affirmative pleas only, or both affirmative and negative. If affirmative pleas only are included, then the demurrer was improper and the judgment right. But if negative pleas also are embraced, then very different consequences follow. In the covenant *there* was an undoubted precedent condition to be per-

formed on the part of the plaintiffs, to-wit: the previous delivery of the tin at the time and place, and that precedent condition occurred; and was to be performed by the delivery of each parcel of boxes, before the defendant was bound to do any thing on his part. The proof of the performance of these precedent conditions, the defendant demanded under the agreement, and the defendants refused to produce such proof, and hence the demurrer. We have no doubt that negative pleas were and are included in this permission or agreement, and that such is the usual understanding of the practice, and is justified by the meaning of the terms employed. We would not be understood as extending such permission to such negative pleas as *non est factum*, or impeaching the consideration which particular statutes, or the rules of practice required to be verified by affidavit, before they are filed; but all other negative pleas are embraced. The precedent conditions were, and must necessarily be, averred, on part of the plaintiff, or no cause of action is shewn. A traverse of these averments are, and must be, made by a special, legal plea; and the defendant did give it in evidence as special matter, on the face of the plaintiff's own evidence; and the want of it was sufficient evidence on part of the defendant. On the face of the record and the plaintiff's evidence, and the issues made by the agreement of the parties, the plaintiffs failed to shew any good cause of action, and the court below erred in rendering a judgment for the plaintiffs on the conditional verdict, when a judgment for the defendant was the only legal inference from the whole record, which contained in it all legal negative pleas on the part of the defendant, those alone which require an oath, or those of a dilatory character excepted.

Judgment reversed with costs, and cause remanded, with directions to enter judgment for defendant on the verdict.

Crittenden and *Brown* for plaintiff; *Chinn* for defendants.

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of all negative and affirmative pleas, except those requiring affidavits.

Mandate for judgment against the party who demurred to the evidence.

CHANCERY. *Blight's heirs &c. vs. Tobin &c.; same vs. same, and Tobin vs. Blight's heirs &c.*

Case 131. Writs of error to the Hardin Circuit; PAUL I. BOOKER, Judge.
Sheriffs' sales. Jurisdiction. Limitation. Evidence. Fraud. Partners. Practice.

November 28. Judge MILLS delivered the opinion of the court.

SAMUEL BLIGHT, a citizen of Pennsylvania, held claims to a considerable quantity of lands in this state, situated principally in the county of Hardin, but extending largely into the counties of Hart and Grayson; and he came to this state and took up a temporary residence in Hardin county, and boarded with his family at a public inn in Elizabethtown, for the avowed purpose of investigating his land claims and settling his business here.

On the 17th of March, 1820, he constituted Benjamin Tobin, a practising lawyer, resident of Hardin county, his agent, by letter of attorney, authorizing Tobin to lease his lands, to receive and recover rents, by law or otherwise, and delivered to him sundry notes, leases &c. evidences of rent due. Tobin was to receive one third collected, for his services. Tobin also acted as attorney at law for Blight in sundry suits, chiefly, if not entirely, for rents due, in some of which he was successful, and in others not.

Tobin also brought against Blight, as attorney and counsellor at law, an action of debt, by petition, in favor of David Simpson, and recovered a judgment therein against Blight, for \$93 50, with interest from the 4th September, 1822, till paid, and about \$7 16, costs. This judgment was obtained at the March term, 1823, in the Hardin circuit court, where both Blight and Tobin then resided. On the 25th of March, 1823, Tobin caused the first execution to issue on this judgment, directed to the sheriff of Grayson, an adjoining county, endorsed that notes of the Bank of the Commonwealth would be received in payment, that kind of paper being then at a depreciation of about two dollars for one. This execution Tobin carried to the sheriff, and caused

Blight's land in Hardin, Grayson and Hart counties.

Agreement between Blight and Tobin.

Judgment against Blight, and sheriff's sale to Tobin of the land claimed by Blight in Grayson.

him to levy it on all the lands of Blight extending into Grayson county, which was not measured, but bounded by the county lines and the lines of the original surveys, and containing some uncertain quantity, of from eight to twelve thousand acres, all of which in the lump, was sold by the sheriff, and Tobin became the purchaser, at the price of about \$30 in said bank paper; and he received the conveyance of the sheriff for the whole. This execution was not returned till the 31st of July, 1823.

BLIGHT'S *he.*
&c.
vs.
TOBIN &c.

On the 21st of June preceding, and upwards of a month before the first execution was returned, Tobin issued a second execution, directed to the sheriff of Hart county, which he caused to be levied on the lands of Blight extending into that county also, amounting to ten thousand acres or upwards; and the whole thereof bounded by the county lines and the original lines of the surveys, without measurement, was sold under the direction of Tobin, and George T. Wood became the purchaser, and received the sheriff's deed thereto, for the joint benefit of himself, Tobin, and a certain Thomas Johnson, at the price of \$55 12 cents, in paper of the Bank of the Commonwealth.

Sheriff's sale
of the land
claimed by
Blight in
Hart, pur-
chased by
Wood for
himself, To-
bin and John-
son.

Tobin also, as attorney or counsellor at law, obtained another judgment against Blight, in favor of Southard and Starr, the amount of which was replevied by Blight; and on the 10th of December, 1823, an execution was issued on the replevin bond, against Blight and his sureties, for the sum of \$87 84 cents debt, with interest and costs, directed to the sheriff of Hardin county; and Blight, to save his sureties, in writing, surrendered 1000 acres of land to the sheriff, who levied thereon, as well as on some personal estate, there being one other execution levied at the same time; and the 1000 acres of land was sold, and Tobin became the purchaser, at the price of \$51 in paper of the Bank of the Commonwealth, and received the conveyance from the sheriff.

Sale by the
sheriff of the
land claimed
in Hardin to
Tobin.

To set aside these sales and conveyances, Blight brought the two suits in equity now under consideration.

Blight's suits
to set aside
the sheriff's
sales.

BLIGHT'S hs.
&c.
vs.
TOBIN &c.

In the one he included the first and the last of the afore recited sales, making Tobin a defendant, and those who purchased from him.

In the second suit he embraced the second sale only, and made Tobin, Woods, and Johnson defendants.

Grounds alleged by Blight for vacating the sales.

All these sales are attacked upon the ground that they were secret, carried on with address, and fraudulent, and illegal; and also on the ground that Tobin was his agent to protect and preserve those very lands; that he had received more money of his than was sufficient to pay the executions, and held it then in his hands, and ought to have paid the executions, and therefore he made the payments under circumstances that constituted Tobin his trustee, and that he ought to surrender the title acquired by the most enormous sacrifices, and at unconscientious prices.

Answers of the defendants.

Tobin, as well as the other defendants, contest all these grounds, and insist upon the title as their own.

Decree of the circuit court for Blight as to the land in Grayson, and for Tobin as to that in Hardin; and writs of error by each party.

On hearing, the court *below set aside the first sale*, made in Grayson county, and decreed a release thereof, and refused to set aside the sale of the 1000 acres made in Hardin; and this composed the decree in the first named case, to reverse which both Blight (or his heirs since his death) and Tobin prosecute their respective writs of error; the *first complaining* that the court did not set aside both sales, and the latter that either was set aside.

Second bill for the land in Hardin dismissed, and writ of error by Blight's heirs.

In the second suit the court refused to set aside the sale to Wood, Tobin and Johnson, in Hart, and dismissed the bill; and to reverse that decree, Blight's representatives have prosecuted their writ of error.

Cases considered together.

We have considered these three writs of error together, as they depend on similar principles, although the circumstances of each sale are somewhat different.

A previous question or two, applicable to each case, is made. It is insisted that the chancellor has no jurisdiction of this matter, and that it belongs to a court of law, and that the motion to set aside the sale not having been made in the court of law within one year, no remedy exists to annul the sale.

We cannot concede that sales of land by *feri facias* constitute a mode of alienation over which courts of equity have no control. We cannot expect to find precedents for such an exercise of jurisdiction in the English chancery or in Virginia; because, that in these countries sales by *feri facias* were rare or altogether unknown. But in the states which have introduced sales in satisfaction of debts by *feri facias*, courts of equity have made them a subject of its revision, as is manifest by the cases of Woods vs. Morvell, 1 John. Chy. Rep. 502; Tiernan vs. Wood, 6 John. Chy. Rep. 411; Troup vs. Wood &c. 4 John. Chy. Rep. 228; Howell vs. Baker, *ibid.* 118; Gist vs. Frazer & Stewart, 2 Litt. Rep. 118. Analogous is the case of Strael's ex'ors vs. Couns, 4 Cranch, 403.

BLIGHT's hs. v
&c.

vs.
TOBIN &c.

Equity has jurisdiction to set aside sheriff's sales of land under executions of *feri facias*.

We do not mean that a chancellor, in exercising this jurisdiction, will act as a revising court over the records of a court of law in executing their process, or make further use of errors at law than to prove or disprove the fairness or unfairness of the sale. He will treat all the proceedings at law as valid, although error may appear therein, and will relieve against the consequences thereof, because the rights acquired thereby cannot be retained in conscience; and in doing so, he will treat the purchaser as a trustee of the estate, and will not compel him to surrender it till equity is done to him.

In bills in equity to set aside sheriff's sale of land, the chancellor will not consider legal objections except as evidences of unfairness.

In this respect the proceeding is more favorable to the purchaser, than in a court of law. His title is treated as legally valid, and his money is generally restored before he will be compelled to surrender it.

In such cases the complainant generally will be required to restore the purchase money.

It is true a court of law will correct the abuses of its process, and that where fraud exists. But as to sales of this kind, the motion for fraud is limited by statute to one year; but the omission to pursue this remedy in the year, is rather a reason for the interference of the chancellor than against it. For the limitation is not on the powers of the chancellor, but on those of a court of law, and the omission to pursue one remedy does not preclude a resort to the other, provided the case is otherwise proper for a court of equity.

Bills for relief against the sheriff's sales of land are not, like motions, limited to one year.

BLIGHT'S BS.
&c.
vs.
TOBIN &c.

Query. Is the fact of the attorney for the plaintiff in the execution becoming the purchaser of the land at the sheriff's sale, a fatal objection to the sale.

On the merits of these sales, a further preliminary observation is necessary. The person who was the legal purchaser at two of these sales, and a partner in another, was the counsel for the plaintiff in both the executions, which were used.

It has been held, or at least said, by some chancellors, that a purchase by counsel in such circumstances, ought not to be permitted to stand. The cases on this point are referred to by chancellor Kent, in the afore cited case of *Howell vs. Baker*, in which he descants with considerable severity on such purchases, and shews that authorities are not wanting to prove, that the purchasing attorney, in all such cases, must become a trustee for the original holder; and that redemption must be allowed. The reason of such a rule appears to be the same which forbids a sheriff to become a purchaser, by statute; or an executor or trustee to become a purchaser of articles of which he is the seller. The attorney for the plaintiff in an execution, is supposed to have such a control over the sale as to come within the reason applicable to the actual seller, and therefore ought to allow a redemption.

If not, yet it is a circumstance to induce the court to scrutinize the purchase with the greater strictness.

But without approving or disapproving these authorities, and not wishing it to be understood that we go the whole length of this doctrine, all the use we shall make of it is, to shew that the chancellor, if he does not carry out this doctrine, will scrutinize a purchase thus made by counsel, with greater strictness than he would a purchase by one who had no control over the execution; and if there be circumstances or grounds to make such a purchaser a trustee, it will be done, securing to him all the money which he may have paid.

Great inadequacy of the price is a heavy consideration against a sheriff's sale.

One circumstance attending all these sales, is calculated to lay them under a weight of suspicion not easily removed, and the conscience of the chancellor will revolt at permitting them to stand as they are. The price is so small, compared with the value of the land, and the sacrifice is so great, that it shocks the moral sense. The land in *Grayson* is proved to be worth something like \$5000 or \$6000 specie, and it is purchased for about \$15. The land in *Hart* is

of about the same value, by the proof, and it is purchased for about \$26. The 1000 acres in Hardin is shewn to be worth at least \$5000, and it is bought for \$25 or \$26, specie. The inadequacy of consideration, *per se*, may not be sufficient to overturn the sale; but it is a circumstance that weighs heavy, and requires but little addition from other circumstances to authorize the inference of fraud. Of the two sales made under the execution of Simpson, of the lands in Hart and Grayson, but little need be said. These sales must be overhauled.

BLIGHT's hs
&c
vs.
TOBIN &c.

Besides the great disproportion of price, there was evidently some degree of both haste and address used in transmitting the execution out of the county, and out of sight of the defendant Blight, to counties where he could not suppose they were gone, not for the purpose of making the money, because there was every reason to suppose the money could be made easier, in the county where Blight was, but with the intention of making a speculation out of his estate, and there the whole unmeasured and undefined quantity was set up and sold as a packed lot at auction, where the purchaser is afterwards left to examine and count what he has got. These with other circumstances, forbid that either of these sales should stand, and the court below erred in refusing to direct a restoration of the title to that land sold in Hart and bought by Wood.

Fact of the attorney of the plaintiff having sent the execution to another county, and speedily effected the sale, without defendant's knowledge, evidence of fraud.

There is one circumstance proved touching that sale more strong than any belonging to the sale in Grayson. A person made known, before the day of sale, his intention to attend, and become a bidder. This was told by him to the counsel for the plaintiff in the execution, of whom he enquired the day of sale. He was flattered in reply with a partnership in the purchase, and told of the day of sale, when he might attend. He attended on the day pointed out, and the sale was over the day before, and he was laughed at because he came a day after the fair.

Purchaser having purposely misinformed a person, intending to attend and purchase, of the day of sale, evidence of fraud.

The only plausible reason on which we can suppose the court relied in sustaining this sale in Hart, whilst it set aside the sale in Grayson county, is, that the purchase was legally made by Wood,

Acts of one partner in the purchase, to effect a fraudulent purchase.

BLIGHT'S &c
vs.
TOBIN &c.

chase at a
sheriff's sale,
imputed to
all.

who, with his partner Johnson, are not proved to have been participating in, or privy to the improper management of the execution. But it is admitted by all three, that Tobin, is, and was at the sale, a joint partner in the purchase when made, and we cannot sustain the principle, that one or more partners are to be saved in a speculation, when one of the parties most active in procuring it, had acted improperly, merely because he or they were ignorant of the impropriety. Each partner must be bound by the act of one, managing the matter in hand, and his title must stand or fall accordingly. The law will account them one person, and the improper acts of one must be the act of all.

Case of the
land in Gray-
son.

In the sale which the court did set aside, there is error in the details of the decree, which we feel ourselves bound to notice.

Situation of
the sub-pur-
chasers with-
out notice.

After Tobin had received the sheriff's deed for the land in Grayson, he sold and conveyed part of the land to sundry persons, who are made defendants. These persons seem to have become purchasers of the title from Tobin, in the following way. They had previously purchased the land from some other persons, under what claim or title is not explained in this record. But their vendor, or his representatives, willing to secure them in their first purchase, bought in this title of Blight from Tobin, and paid him therefor \$500 in paper of the Bank of Commonwealth, and Tobin by his, or their, direction, conveyed the title to these defendants, and each of them answer and deny all knowledge of fraud or improper practice in conducting the sale, and there is not the least proof that they had any notice or knowledge on this subject, except what the deed of the sheriff to Tobin conveys, which is fair on its face and gives no intimation of any impropriety, except what the small price intimated, and this we have seen of itself does not establish fraud.

Decree a-
gainst the
sub-pur-
chasers of Tobin
for a special
re-convey-
ance.

The court decreed against these defendants that they should relinquish, or convey back, their title to the complainant by deed with special warranty against themselves, and all claiming under them, "but not disturbing any prior or other title, the said

defendants may have had to said land, before the said sale, and purchase from the sheriff, but leaving the same as it then and before stood, unaffected by this decree." **BLIGHT'S he &c vs. TOBIN &c.**

Now how these defendants could convey with warranty against themselves, and those claiming under them, and yet be allowed to retain other claims to the land, is to us an inconsistency not reconcilable on the face of the decree. Moreover, how these defendants could convey a title from themselves, and yet retain a title in themselves, is a problem which is not easily solved; for we are not acquainted with the process of severing or splitting asunder titles after they are united in the same person; but conceive the law to be that if a purchaser holding one title honestly, acquires another dishonestly, so that he must surrender the latter to its true owner, his former title goes along with it.

One who holds the valid title, and afterwards acquires a bad one, cannot convey or release the latter without the other; both will be passed by any instrument which conveys one.

And the only way that he could excuse himself from such a consequence, would be to set up his first title, and shew its validity and superiority, and of course that he acquired nothing by the last title, which he ought to surrender back. If therefore, these purchasers from Tobin, ought to convey, they could not retain previous titles to the land, as they have not set up and shewn their superiority.

Where a person having one title afterwards acquires another by fraud, he can resist a general conveyance only by shewing his first title the superior.

But we do not see the propriety of any decree against these defendants. So far as appears, they are innocent purchasers without notice of any impropriety in the sale. The bill ought therefore, as against these defendants, to have been dismissed with costs.

Vendee without notice of a fraudulent purchase at sheriff's sale, not affected by the fraudulent purchase. But the purchaser under the execution must account for the proceeds of his sale to the former owner.

But as Tobin held this title when he ought not, and has sold it to those innocent purchasers, by which Blight or his representatives have lost it, it follows clearly that he must account to Blight's estate for the value of the land so conveyed away by him, to be fixed at the time of assessment, and this is the decree which ought to be rendered as to this portion of the land, he conveying back the title to the residue.

As to the last sale in the county of Hardin, of 1000

BLIGHT's he
&c
vs.
TOBIN &c.

Facts in rela-
tion to the
sale of the
land in Har-
din.

acres given up by Blight, it is a question of more difficulty, and is a case nicely balanced between an enormous and unconscientious speculation, on one hand, and the imprudent conduct of Blight, and the stern law of the case on the other. This was sold under the execution of Southard and Starr. The sheriff had this execution, which did not amount to \$100 in bank paper, and also another of a larger sum, perhaps about \$500 in favor of Southard alone, against Blight, at the same time, and both these executions were on replevin bonds, and endorsed that bank paper would be taken. The sheriff levied them both on two horses, belonging to Blight, and Blight also to save his securities in the replevin bond, gave up to the sheriff, by writing describing the land, this 1000 acres now in dispute, on which he had a tenant residing at the time. The sheriff under both these executions advertised the two horses for sale on the 14th February 1824, in Elizabethtown, and the land on the premises on the 15th of the same month, adding to the advertisement, that the land would be sold "provided the personal property first named, (to wit, the horses) and described, shall fail to satisfy the same." Before either day of sale, the larger execution was taken out the way by an injunction. Why the horses were not sold on the 14th of the month, to satisfy the smaller execution of Southard and Starr, is not explained in the record. The day for the sale of the land however came, and the parties were all in Elizabethtown, and Blight seems to have been struggling to make some arrangement to save his land. A Mr. Bland was indebted to him, and to Bland, he applied for the money. Bland applied to a Mrs. Vanmetre, who was in his debt for the money. She had more than the necessary sum in paper of the Bank of the Commonwealth, which she offered to furnish to Bland, provided Bland would give her credit at the rate of two dollars on her bond for three dollars in bank paper. This was greater than the usual rate of exchange. Bland was unwilling to give this, unless Blight was willing to make this allowance, to which Blight disagreed, and thus part of the day was spent in chaffering about this money, and

the sheriff urging Blight to get the money, or he would go and sell the land, and reminding Blight at the same time, that the proper time of the day for the sale of the land by law, would be over by the delay. Blight assured him that the money would be had, and asserted that he would take no advantage of the time of day, if the day passed away and the land must be sold. The sheriff vexed, at length determined he would go and sell the land, and gave notice to Tobin, the counsel for plaintiffs, that he was starting for the purpose, and Tobin started with the sheriff. Blight and Bland both started after them, and overtook them before they got to the ground, about seven miles from town. On the way, Blight, in an ill humor, reminded Tobin that he was acting as his enemy, when he professed to be his friend, and was his agent and counsel, and told him that he must discharge him from his service, as he wanted no such friends, or words to that import. When they arrived on the ground, the time of day fixed by law for selling the land was passed, and the number on the ground seems to have been the sheriff, Blight, Bland, Tobin, and the tenant of Blight, at whose house the sale was. Blight there tendered the horse which he rode, which was one of the same horses advertized as personalty before spoken of, to be sold in lieu of the land. The sheriff took the horse and began to cry him, and stated he could get no bid. The tenant of Blight then offered to bid, and Tobin then interfered and told the sheriff that he would render himself liable if he sold the horse, and the sheriff then gave back the horse to Blight, and set up the land for sale. Bland soon bid the debt for half the land, and when the land was struck off to him, told the sheriff that he had not the money with him, but the money was in town, and he would pay it as soon as they returned. The sheriff refused to go to town, but required the money on the spot, which neither Bland nor Blight, for whom Bland had bid off the land, had with them. The sheriff accordingly set up the land again, and refused to cry the bids of Bland; and Tobin, without competition bid off the land for \$51 in bank paper. After the parties returned to town, Bland and Blight

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offered to the sheriff the amount of the execution and he refused to receive it.

Equity may interpose and permit a redemption of land sold under execution, on the ground of the conduct of the sheriff and purchaser, where a court of law would not set aside the sale.

We have come to the conclusion that the purchaser in this case ought to be construed into a trustee for the complainant, although there is some difficulty in saying that the purchase was against law; and we will add that there may be cases where the chancellor will interpose and permit a redemption of estates sold under execution, ever when a court of law would refuse to set aside the sale as a fraudulent violation of law, because the chancellor may do complete justice by restoring the money paid, which a court of law cannot do, and from the relation of the parties, equity may presume a trust which sometimes may become necessary to avoid an odious speculation on the distresses of the debtor.

Chancellors have ordered re-sales of property sold under execution at enormous sacrifices.

Indeed cases are not wanting where a party plaintiff has bought in property at an enormous sacrifice, under execution, and the chancellor has directed it to be set up again at the price at which it was bought, and for as much more as would be bid, still preserving the interest of the purchaser by securing his money.

Purchasers not affected by irregularities of the officer, but the officers are liable to the party injured

It is a settled rule that a purchaser is not bound, nor is his purchase affected by the irregularities of the sheriff in advertising and conducting a sale, and if injury results, the party must take his remedy against the sheriff. Hence courts of law but seldom set aside titles thus fairly acquired by an innocent purchaser acting under the confidence which ought to be reposed in the organs of the law.

But where the purchaser is the conductor of the sale, and knows of the irregularities, the chancellor may compel him to surrender the title on receiving his money back.

But whether there might not be cases of that kind, where the chancellor would construe such a title into a trust, we need not now enquire. Suffice it to say, that in a case where the conductor and director of a sale, as Tobin was in this instance, knows of the irregularities of the officer, and that those irregularities had brought this land into market under circumstances which demanded so heavy a sacrifice, he ought to be compelled to surrender his title on receiving his money.

If the sheriff had proceeded with the sale of the

personal estate at the proper hour, there could have been no necessity of selling this land. The circumstance of omitting to sell the personalty, and then insisting on the sale of lands of \$5000 in value, to satisfy an execution, not amounting to \$100, at an hour when the attorney who only could, and did direct the sale, could purchase it at, not much more than \$25 in specie, and that without competition raises too violent a presumption of combination between the two, to permit this sale to carry the title forever.

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&c
vs.
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Irregularities
by the officer
in the sale.

This conclusion is not a little strengthened by the circumstance of the attorney deterring the sheriff from selling the horse, in order that the land might be sold. The fact was, the execution was laid upon the horse, and the authority of the sheriff to sell him was complete, and all that stood in the way of his sale then, before the land, (as was the rightful course) was that the then time and place was not advertised. This, however, was waived by Blight. But the attorney by his advice, defeated the sale of the horse, and thus reached the land.

Controller of
the execution
having pre-
vented the
sheriff from
first selling
the personal
property sur-
rendered by
defendant to
be sold, with-
out notice,
and then pur-
chased the
land himself,
compelled to
submit to re-
demption.

It is also proper here to take notice of the accounts of the parties brought into view by the pleadings. Blight insists that Tobin has received more of his money than is sufficient to pay the price of this land, and has adduced proof of his receiving money to some amount. Tobin admits the receipt of some money, but alleges that Blight owed him for fees, and has proved that he acted as counsel for Blight, so as to be entitled to fees to a greater value than what he has received; also that he has made some disbursements for Blight. If these services were rendered as counsel for Blight, in the recovery of rents only, then Tobin, by the contract proved, is entitled to one third only. If the services were rendered in other cases, then he is entitled to reasonable fees. As Blight, therefore, or his representatives, must restore the purchase money, paid for the land, scaled to its specie standard, so an account must be taken of the money of Blight, collected by Tobin, allowing him one third thereof, for his services as counsel, as far as rent is concerned,

Accounts be-
tween Blight
and Tobin to
be settled.

BLIGHT's he and reasonable fees for other services; and **Blight**
&c must also be charged with the price of the land,
vs. and if the balance be in favor of **Tobin**, the court
TOBIN &c. below must see to the payment thereof, before giving
 _____ a decree for the title.

Decree in the This account must be taken in the case, wherein
case of the **Blight** was plaintiff, and **Tobin**, **Morrison Dewit**,
land in **Wooldridge** and others, are defendants; in which
Grayson. **Tobin**, on the restoration of his money, must be de-
 creed to release, and convey the 1000 acres, and al-
 so all that part of **Blight's** land lying in **Grayson**,
 which he has not sold and conveyed to **Wooldridge**
 and others, and the bill must be dismissed as to
Wooldridge &c. grantees of **Tobin**, and an assess-
 ment of the value of the land conveyed to them res-
 pectively by **Tobin**, must be made by commission-
 ers, and **Tobin** must be decreed to pay the amount
 thereof to **Blight's** representatives. **Morrison** and
Dewit, who are mortgagees of the 1000 acres, and
 who profess their readiness to release it, must be de-
 creed to reconvey without costs.

Decree in the In the case where **Blight** is complainant, and **To-**
case of the **bin**, **Woods** and **Johnson**, are defendants the de-
land in Hart. **fendants**, on receiving the price paid by them, assess-
 ed in specie with its interest, must be decreed to re-
 convey all the lands lying in **Hart** county, with
 costs.

Decree in the The decree in the writ of error, **Blight's** repre-
case of the **sentatives vs. Tobin**, **Wooldridge &c.** must be re-
land in Har- **versed** with costs, against all the defendants, except
din. **Morrison** and **Dewit**, and the cause be remanded for
 proceedings, not inconsistent herewith.

Mandate in In the case of **Blight vs. Tobin**, **Wood** and **John-**
the Hart case **son**, the decree must be reversed with costs, and the
 cause be remanded for new proceedings, not incon-
 sistent herewith.

Costs. **Tobin** must pay the costs of the writs of error
 prosecuted by him, in the suit, **Blight vs. Tobin**,
Wooldridge and others, as he has failed to prose-
 cute it with effect.

Petition for a Rehearing, by BEN. HARDIN.

BLIGHT's hs
&c
vs.
TOBIN &c.

THE undersigned who argued these causes in the court below for Tobin, has this morning for the first time learned, that this court had given an opinion, which he has in part examined, and has, in equal haste, drawn this petition for a rehearing, as he understands the court is to adjourn in a few minutes. As to the one thousand acres, the court has construed Tobin into the character of a trustee in his purchase. Upon what principle they have done it, I am at a loss to conjecture. Was he Blight's agent in the sale of that land? I answer, no. He was the attorney on the other side; and before the sale Blight dismissed him from all other agencies.

Petition for
rehearing.

Had he any money of Blight's in his hands? I answer, not one cent. The doctrine about a counsel being construed into a trustee, cannot be sustained; but if it could, it is a trustee for the person who employed him, and not the adversary of his client. There are but two trusts resulting by operation of equity known to the books, since the statute of frauds. One is, where A is furnished by B with the funds to purchase land for him, and A promises to make the purchase, and then fraudulently purchases in his own name. The other is, where property is conveyed in trust for particular purposes, and no disposition made of the remainder. Then equity implies a resulting trust by implication after the objects of the trust are answered: See 2 Vol. of Fonblanque, 116, 117, 118, and Shepherd's Touchstone. In truth and fact, to give our statute of frauds a fair construction, there ought only to exist the latter kind of trust, as all other trusts are within the mischief of that statute. I have been informed that no counsel argued for Tobin; he would have attended himself, I have no doubt, had it not been for a belief that the court would not decide causes argued or submitted last term. It is hoped that a rehearing will be granted.

Answer to the Petition, by PATRICK H. DARBY.

IN this cause the court was understood to subject the land to redemption, on the
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Answer to
the petition.

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 &c.
 TOBIN &c.

Answer to
 the petition.

principle, that there are, and may be, cases of hardship, where the purchaser holds a control over the sale, and there is great inadequacy of price, and all other facts in the case will be taken as evidence either of fraud, or such hardship as to warrant a redemption, by the payment of purchase money and interest. And that this is one of those cases. But these principles aside, Tobin was a purchaser with notice of the acts of the sheriff in not selling the personal property, and that that misconduct of the sheriff was produced by Tobin.

On principle, as well as on authority, the decision is maintainable on clear principles of law and equity, by the books and authorities cited by the court.

THE COURT overruled the petition, and the decision stands unaltered.

Darby for complainants; *Wickliffe and Mayes* for defendants.

CHANCERY.

Webb's heirs &c. vs. Webb.

Case 132.

Error to the General Court; JOHN L. BRIDGES and HENRY PETERLE, Judges.

Wills. Mistakes. Parol evidence. Statutes. Frauds.

November 29. Judge OWSELY delivered the opinion of the court.

Last will of
 Winny Webb
 made and
 published.

ON the tenth day of May, 1828, Winny Webb, in due form of law made and published her last will and testament in writing, and on the twenty ninth of August thereafter, she, in proper form, attached thereto a codicil making a slight alteration in her will.

Probate of
 the will.

In September, 1823, the testatrix departed this life, and her will and codicil was afterwards proved, and admitted to record, Matthew T. Scott, one of the executors therein named, at the same time, taking upon himself the execution of the will.

Substance of
 the will.

At the date of the will, the testatrix was possessed of a large estate both real and personal, most of which was by its provisions distributed specifically among her relations; but there is no clause in the

will disposing of the residue of her estate, after paying debts and legacies.

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&c

vs.

WEBB.

The residue, though small in comparison with the entire estate, amounts to several thousand dollars, and consists altogether in debts owing, and other personal estate.

Residue of
the estate not
devised.

Claiming to be entitled to the residue, James Webb exhibited his bill in equity against Scott, the executor, and the heirs of the testatrix, and on hearing, the court pronounced a decree in his favor for the amount thereof.

Bill of James
Webb, and
decree in his
favor for the
undivided
property.

The facts proved in the cause, and upon which the decree in favor of the complainant was made, are briefly these.

Evidence
that the tes-
tatrix direct-
the writer of
her will to in-
sert a clause
devising the
residue of her
estate to the
complainant,
which he om-
itted by
mistake, but
which she al-
ways believ-
ed was there.

On the day of its date, the will, at the request of the testatrix, was written by a Mr John H. Jones, in her presence, and at her request. Each of the bequests were dictated by her, and after the will was concluded it was read over to the testatrix, signed by her, and attested by two witnesses in her presence. But whilst writing the will, Jones was more than once told by the testatrix to insert a clause in favor of James Webb, for all the residue of her estate after the payment of debts, legacies &c. No such clause was however inserted, but through the neglect of Jones, who at the time was somewhat indisposed, was omitted, though at the time she signed the will, and until her death, it was thought by the testatrix that the will contained a bequest of the residue of her estate after paying debts, legacies &c. to James Webb. It does not appear that in omitting the residuary bequest any fraud was intended by Jones, or that any of the heirs of the testatrix were in any manner instrumental in causing the omission.

These are the material and prominent facts proved in the cause, and the question is, whether upon this proof it was correct for the court to supply the omission in the will and decree the residue of the estate not disposed of by the will as written to James Webb.

Question
stated.

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vs.
WEBB.

Another question was debated at the bar by the counsel of James Webb, and it may not be improper to notice it before we proceed to examine that already stated, and upon the solution of which the cause must ultimately turn.

Prior will of the testator, containing the clause omitted in the last.

The bill charges that the testatrix had previously, in 1821, made and published, in due form, another will, in which the residue of her estate, after paying debts and legacies, was bequeathed to James Webb. This will is referred to and made an exhibit in this cause; and it is contended by the counsel of James Webb, that as the will of 1823 contains no revoking clause, the will of 1821, as regards the residuary bequest, is still operative; and that even were it incompetent for the court to supply the omission in the will of 1823, upon the facts proved, yet the complainant, James Webb, is entitled to the residue, under the will of 1821, and that it was correct in the court below to decree accordingly.

Lack of proof of the execution of the prior will held fatal against its effect here.

It is evident, however, that *nothing in support of the decree which was pronounced in favor of James Webb for the residue undisposed of by the will of 1823, can be drawn from the will of 1821, referred to in the bill.* The execution of that will by the testatrix, Winny Webb, is not admitted by her heirs, and though expressly put upon the proof of every thing necessary to entitle him to relief, James Webb has totally failed to prove by either of the subscribing witnesses, that it was executed by her, nor does it even appear from the record before us, that it was ever subscribed by her. To bestow further notice on the will referred to, would therefore be altogether useless, so self evident is the proposition that none of its provisions can avail the complainant in this case.

Having disposed of the will of 1821, we shall return to the question first propounded, and examine whether, upon the facts proved, it was competent for the court to supply the omission in the will of 1823, and to decree the residue of the estate not disposed of by that will to the complainant Webb.

If the residue undisposed of by the will, consisted

of real instead of personal estate, it would seem perfectly clear that the omission could not be supplied by the evidence in the cause so as to authorize a decree in favor of James Webb. The evidence as respects the omission in the will is made up by the swearing of witnesses, and to allow testimony of that sort to change, alter, or add to, written devises of real estate, would not only violate one of the most firmly settled rules of evidence, but would also be in direct opposition to the statute which requires wills to pass real estate to be in writing.

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vs.
WEBB.

Parol evidence is not admissible to supply a clause in a will devising real estate, omitted by mistake.

But the residue undisposed of by the will consists not of real, but personal estate only, and as personal estate may be disposed of by nuncupative will, it may be contended that the rule is different, and that parol evidence ought to be allowed to supply and add to the will the omitted bequest of the residue of the testatrix's estate. The argument is indeed plausible, and would be deserving high consideration, provided there were no restrictions upon the power to dispose of personal estate by nuncupative will, and provided the evidence in the cause brought the case within the restrictions prescribed for bequests of that sort. But it will be perceived, by adverting to the act of assembly on that subject, that the legislature have imposed various restrictions on the power of disposing of personal estate by nuncupative will, and by turning to the evidence in the cause, it will be found that the present case is not brought within the restrictions prescribed.

Question in case of personal estate.

The act provides: "No nuncupative will shall be established, unless it be made in the time of the last sickness of the deceased, at his habitation, or where he hath resided for ten days next preceeding, except where the deceased is taken sick from home, and dies before he returns to such habitation; nor where the value exceeds ten pounds, unless it be proved by two witnesses, that the testator called on some person present to take notice or bear testimony that such is his will, or words of the like import."

Statute in relation to nuncupative wills.

"After six months have elapsed from the time of speaking the pretended testamentary words, no tes-

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WEBB.

timony shall be received to prove a nuncupative will, unless the testimony, or the substance thereof, shall have been committed to writing within six days after making the will."

To supply a clause in a will bequeathing personal estate, the bequest ought to be proved as a nuncupative will.

The evidence in the cause, though it goes to prove that the writer of the will was instructed by the testatrix to insert a bequest in favor of James Webb, for the residue of her estate, and though when signed by the testatrix, the will was thought by her to contain such a bequest, but does not, and through the neglect of the writer appears to have been omitted, yet it is by the testimony of one witness only that those facts are made to appear, and though the residuary estate exceeds the value of ten pounds it is not attempted to be proved that the testimony of that witness, or the substance thereof, was committed to writing within six days after the making of the will; and not only so, but more than six months had elapsed from the date of the will before his suit was commenced by James Webb.

Parol evidence has been admitted to control the provisions of wills in cases of fraud.

To allow the will to be added to by evidence of this sort, we should, therefore, not only virtually break down the restrictions placed by the legislature on the power of disposing of personal estate by will, but we should be introducing a rule of property hitherto unknown to the law, and not recognized by approved precedents.

Cases of the admissibility of parol evidence to control writings.

Cases are to be found in which parol evidence has been sometimes let in, to control written wills and other instruments, but in every such case fraud is the alledged ground and object of the parol evidence.

In his treatise on the statute of frauds, it is said by Roberts, (78) "though the statute may have increased the jealousy of parol evidence, yet it raises no barrier against its admission where it professes and tends to support a charge of fraud. The antipathy of the law breaks through all reserves, to accomplish the overthrow of deceitful contrivances. Thus, although evidence to shew that, by an inadvertent phrase in a will, the testator has made a provision contrary to his real intention, would probably be rejected; yet if it extend to prove that

the testator had been led into the error by the designing misrepresentations of persons attending his sick bed, the charge of fraud would let in the evidence proposed." Again, page 79, he says, "the fraud, however, must, in these cases, be the alleged ground and object of the parol evidence. Where fraud is alleged in the bill, and the evidence goes to establish it, the statute of frauds may very properly be put out of the way, since the object of the evidence is not properly to contradict the instrument, but to raise an equity *dehors* the instrument, in contravention of a purpose which no law or statute will be suffered to assert or protect." And in illustration of the same principle he proceeds to remark, that trusts and provisions have sometimes been added to instruments to effectuate the intention of the party, when suppressions or omissions have been induced by the fraud or misrepresentations of others. But he has given no case where omissions not superinduced by fraud have ever been made the foundation of the active interference of the court in favor of a complainant, seeking, by the production of parol evidence, to add to the provisions of a will.

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WEBB.

If therefore, in England, where greater latitude in departing from the strict letter of the statute of frauds has been indulged, than by the courts of this country has been thought allowable, the omission of a bequest, not occasioned by fraud, but by neglect, would form no ground for supplying the omission and adding to the will, in this country, where the letter of the statute is regarded with greater strictness, the reason is still stronger for refusing the aid of the court to supply the omissions alleged by the complainant, and attempted to be proved by parol testimony only.

Statute of
wills, and
frauds and
perjuries.

The decree must be reversed with cost, the cause remanded to the court below, and a decree there entered, dismissing the bill, with cost.

Decree and
mandate.

Crittenden and *T. A. Marshall* for plaintiffs; *Mayes* and *Huggin* for defendant.

CHANCERY.

Davis and Stones vs. Phelps.

Case 133.

Appeal from the Madison circuit; GEO. SHANNON Judge.

Bank note contracts. Mortgages. Conditional sales. Practice. Vendor and Vendee. Liens. Error. Rents. Interest. Costs.

November 29.

Judge MILLS delivered the Opinion of the Court.

Phelps' deed of conveyance to the Stones.

On the 30th of April, 1823, Philip Phelps being seized in fee of a tract of land, conveyed it to Samuel and James Stone, by a deed with general warranty, expressing a consideration of eight hundred dollars.

Agreement between the parties for the redemption of the land.

At the same time, the said James and Samuel Stone executed to said Phelps a writing reciting that they had received such conveyance; that Phelps was indebted to them about one hundred dollars; that they had loaned him, that day, eighty dollars more, and were to furnish him, from time to time, what goods he might want, and also two hundred and fifty dollars more between the date of the writing and the ensuing fall, as it might suit them, it being understood that the whole money and goods so furnished, should not exceed five or six hundred dollars. It was further stipulated that said Phelps wished to purchase the land back so soon as he might find it convenient, and they would re-sell it for the amount of his accounts and notes, which they might have against him; that is, when he paid them the whole of his debt, they were to convey to him the land above described, provided the payment was made in two years, and they were to account to him for the rents of the land, except the rent of the current year, which Phelps was to receive, and afterwards they were to have the possession.

Phelps sells part of the land to Davis, and he agrees to pay the Stones.

On the 20th March, 1824, Phelps sold eighty acres of the same land to William Davis, leaving a part contained in the conveyance to the Stones unsold, at the price of \$12 per acre, amounting to \$960, \$194 50 of which Davis paid him in hand; and the parties to this contract entered into a writing, in which it was stipulated that, in order to obtain the title it was necessary to pay to the Stones about \$400 in gold or silver, and that Davis should pay said debt,

or whatever was due to the Stones, and have a credit for it in the price of the land, which payment was to be made on the 1st of January, 1825, and the balance of the purchase money was to be paid to said Phelps on the same day, if the money was got from Moses Reynolds, to whom Davis had sold a tract of land; if not then, the payment was to be made within one year thereafter, Davis paying interest. Phelps also, in said writing between himself and Davis, transferred the writing which he held for the redemption and re-conveyance of the title, and Phelps was to convey said title with warranty to Davis, so soon as Davis paid the Stones what was due to them, and so soon as Phelps could get the title from Samuel Stone, and the representatives of James Stone, he having departed this life.

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vs.
PHELPS.

On the 27th of May, 1825, Phelps brought his action of covenant on the writing executed between him and Davis, and recovered a judgment against Davis, in damages, equal to the whole price of the land, except the \$194 50 paid in hand, and excepting also the last payment, which was contingently suspended till the first day of January, 1826.

Judgment recovered by Phelps ag't Davis, on his covenant.

To enjoin this judgment, Davis filed his bill in equity against Phelps and the Stones, charging that Phelps was insolvent; that he could not get the title except from the Stones; that Phelps had misrepresented his debt due to the Stones, and that it was far beyond \$400, and that the Stones contended they were not bound to convey the land at all, and that their purchase was a conditional sale and not a mortgage; that the sum due to the Stones was in Commonwealth's bank paper, but was secured by notes calling for dollars. He prays that the account between the Stones and Phelps may be settled, and that the debt may be discharged out of what he owed Phelps, and the rents settled and decreed to him from the time he ought to have had the title, and that a conveyance should be made to him, and for general relief.

Davis' bill against Phelps and the Stones.

Phelps answered, contending that he did not owe to the Stones more than \$400, and insists that the accounts should be settled between him and the

Phelps' answer and cross bill ag't the Stones.

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vs.
PHELPS.

Stones; that Davis should be compelled to pay the amount due the Stones, and that the Stones should be compelled to convey, and Davis to accept the title, and to pay the whole balance of the land. He charges that the sum due to the Stones was in bank paper, then greatly depreciated, though the notes were drawn for dollars, and he requires the demand to be scaled; and makes his answer a cross bill against both Davis and the Stones.

Answer of
the Stones.

The Stones answer both the original bill and this cross bill, and insist that their purchase was a conditional sale, but they are still willing to convey the land, if the debt due them, is paid. They admit that the sum due them, though nominally specie, is in paper of the bank of the commonwealth, which they are willing to receive, and nothing else, and if that is not paid to them, they refuse to convey; and they exhibit the amount of their demands due by note, and express a willingness to settle and give credit for the rents.

Decree of the
circuit court

The court below, through the intervention of a commissioner, settled the account between Phelps and the Stones, and liquidated the bank paper to specie, and calculated interest thereon, and gave credit for the rents received by the Stones, and decreed that Davis should pay the balance by a certain day, and if he failed to do so, that the land, or that part of it which Davis had bought, should be sold to pay the debt; and if that was not enough, then the other part, not sold to Davis, should be sold, and the amount thus discharged; and also directed conveyances to be made to Davis, if he paid the amount.

Grounds relied on by the
Stones.

From this decree, both Davis, the complainant in the original suit, and the Stones, who were defendants in both bills, have appealed. It is here insisted by the Stones, that they ought to have had the amount due to them, allowed in paper of the bank of the commonwealth specifically, and ought not to have been compelled to part with their title unless this had been granted.

They attempt to support this by insisting that the title made to them was a conditional sale, and not a

mortgage; and consequently, that the right to repurchase was forfeited, and could only be decreed on the terms offered in their answer, which was to take the bank paper now; and also, on the further ground that they would have a right to recover bank paper, specifically, by the remedy given by act of assembly, and, therefore, they ought to be allowed to recover it on their mortgage, or their election to do so.

DAVIS & Co.
vs.
PHELPS.

Marks of a mortgage, in contradistinction to a conditional sale.

As to the first ground, the question between a mortgage and conditional sale is often one of difficulty, because it is a question of intention often to be inferred from the acts and understanding of the parties, without any express declaration or evidence on the subject. But in this case we do not conceive the question difficult. The deed, it is true, is absolute on its face, but the instrument of writing, executed at the same time, is a complete defeasance on condition of the repayment of the money, and all such writings will be taken together in a court of equity, as one instrument, and have ever been construed as a mortgage, as much so as if the condition was inserted in the deed, unless there is something in the terms of the writing, or circumstances of the case, which forbids that interpretation. Construing these writings in this manner, it is clear that the Stones kept the debt due to them entirely distinct from the price of the land, and the debt was never supposed to be extinguished by it, during the period for a repurchase. The Stones took notes to close the accounts long after the deed, and preserved in their own hands other legal remedies besides resting upon the title to the land. They could, by an action or actions of debt, at any time, have recovered their demands, and at all times had their election to do so; when if it was a conditional sale, the debt would have been discharged by the conveyance, and could only have been resuscitated by the repurchase. The parties continued to treat it as a mortgage, and to make further advancements upon it, and we have, under these circumstances, no hesitation in construing this conveyance to be a mere security for money, and therefore redeemable in a court of justice, as a mortgage would be after the condition was forfeit-

Where an obligation is written by mistake for money, instead of commonwealth's bank notes, the chancellor will not allow the creditor to insist on the paper; but the specie value of the paper when due, with interest, is the amount of the demand.

DAVIS &c.
vs.
PHELPS.

Mortgagor's
demanding
more than is
due, does not
affect his
right to re-
cover the
costs of a suit
to foreclose
the equity of
redemption,
and sell the
estate.

Such costs
ought to be
paid out of
the proceeds
of the sale.

Cases where
the bill may
be dismissed
on the com-

ed. The right to redeem does not, therefore, rest on the answer of the defendants, but exists in equity, independent of the answer; and the Stones can only be entitled to receive that, which Phelps is legally liable to pay.

As to the second ground, of the Stones having a right to recover paper, specifically, in a court of law, it is not admitted that they could so recover. The notes are not made payable in bank paper on their face, which is an indispensable requisite of the statute. The notes are simply drawn for dollars, and therefore on their face could demand specie, and it is by the confession of the parties alone that they are to be now taken as notes securing bank paper, and we are aware of no form of action under the statute which would admit of a specific recovery of paper in a court of law. Besides, though part of these notes by which this debt is secured are dated after the act of assembly was passed, yet another part of them are dated before the passage of this act, and it has already been settled by this court that the act did not embrace notes executed before its passage. And as to the part executed afterwards, they were all executed in conformity to, and in completion of a previous contract between the parties, which was drawn and entered into before the passage of the act, and which seems equitably to control and fix the construction of the subsequent writings between the parties, and ascertain the criterion of recovery by the Stones, and that is, as the court below has decided, the value of the paper when due, fixed at a specie standard, with its accruing interest, and the Stones cannot complain of the decree upon this ground.

It is also insisted by the Stones, that the court below erred in refusing to allow them their costs out of the mortgaged estate; but after decreeing them their costs, allowed them to be recovered of Phelps alone, who is admitted to be insolvent.

This exception is well taken. For although the Stones, as we have seen, demanded too much upon their mortgage, by insisting on the appreciation of the bank paper, yet they ought to be allowed to re-

cover what is really due to them. If they had filed their bill to foreclose this mortgage, insisting upon this appreciation, and asking a foreclosure of the mortgage to gain their demand, their being defeated in the recovery of the larger sum would not have prevented them from recovering what was really their due, and that with costs, unless there had been a previous tender to them of the right sum, or some such controlling circumstance depriving them of costs. As there has been no offer to pay them, and in this suit they stand as defendants, there is the same reason that they should recover the costs, and that they should also receive it out of the mortgaged estate.

DAVIS &c.
VS.
PHELPS.

plainant's default in paying the money, according to the interlocutory decree.

For it is a general rule that he who has to resort to a court of equity, to enforce a mortgage, has a right to have the costs necessarily incurred, charged on the mortgaged estate; and the Stones ought not to be compelled to trust to a recovery thereof from Phelps, from whom nothing can be recovered. These costs must also be a credit to Davis against Phelps.

Mortgages cannot be compelled to accept a *replevin* bond in lieu of his lien on the land.

There are also insuperable objections to the form of the decree, which was calculated to embarrass the rights of the parties. The court gave to Davis and Phelps, time to redeem the premises by paying the money, and here the court ought to have rested, with only directing, unless they did so pay by a time specified in court, then a foreclosure and sale would be decreed. On the coming of this day, if the money had not been paid, or tendered out of court, and then brought into it, the court ought to have decreed a sale. In some such cases, where the mortgagees are complainants, it is usual to dismiss the bill in case of failure to pay, but in this case, that ought not to have been done, because that Davis has an interest in the land, and a lien for what he has paid, subject to that of the Stones, therefore, he had a right to insist upon the sale. Instead, however, of doing this, the court below, after fixing the day, went on, in the same breath, to direct the sale on the failure to pay the money, and appointed a commissioner to execute it, and delegated to him all the

Davis' complaints against the decree.

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the judicial duties of deciding upon the payment, or tender, of the money; a substantial inaccuracy in foreclosing mortgages in the inferior courts, of which we have frequent cause to complain, in the practice of the inferior courts.

Smallness of
the matter of
the error may
be an objec-
tion to a re-
versal.

There is a further objection to the decree, worthy of notice, and that is, the court allowed to Davis the right to replevy the amount of the decree in the clerk's office, and thus to release the lien of the Stones on the land, thus compelling them to accept Davis recognisance in lieu of the security afforded them by their mortgage, and making them abide by the contract between Davis and Phelps, to which they were neither party or privy.

Interest and
rents between
vendor and
vendee ought
to run togeth-
er.

Davis also complains of this decree, and we must now attend to his supposed grievances. The grounds of complaint, alleged by him, are that the court below: First, failed to allow him rents for the land from the time he ought to have had the title and possession: Secondly, that the court allowed the full price of the land to Phelps, including what was recovered by the judgment at law, and adding thereto a balance of the last instalment, which was not recovered at law, and then dissolved his injunction for that balance; thus allowing Phelps to recover by the aid of his judgment what was not in it; or an instalment for which there was no recovery at law: Thirdly, that the court erred in allowing against him the cost of the action at law which he insists, was wrongfully brought by Phelps.

Decree cor-
rected as to
rents and in-
terest.

Asto the rents, if the decree was not to be reversed on other grounds, we might feel somewhat indisposed to disturb it on that account; because the court has refused to charge Davis with the interest of his purchase money, and the interest comes so near to the amount of the rents, that the difference would hardly be of sufficient value to disturb the decree.

And it is evident that rents and interest ought to run together, and as he was kept out of his land for which he was entitled to rent, so Phelps, or his creditors, were kept out of the money of which Davis had the use in the mean time.

It would however, have been more regular to have charged Phelps with the rent, and Davis with the interest of the money after it became due, especially as part of the purchase money was by express stipulation to bear interest before it could be coerced, and the effect of the decree is a specific enforcement of the contract for the sale by Davis. It is true, Davis himself was in default, and did not do all that he might have done before he was sued, or before he brought this suit. He did not tender to the Stones the \$400 on the day it was due, nor did he endeavor, by any application to them, to ascertain what was really due, or make any effort to pay it. But Phelps by his action at law has insisted upon the contract, and thus waived the defalcations of Davis, which gives the latter a right to come into a court of equity, and insist on a specific performance. It is therefore, more strictly correct to charge him with interest of the money and give him his rents. It is true that the Stones get these rents, and are bound to credit them on their demand, and part they have gotten, and Phelps has given them a receipt therefor; but while Phelps obtains a credit against the demand of these rents from the Stones, Davis ought to have received a credit for the same amount against his demand against Phelps.

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vs.
PHELPS.

Injunction
ought not to
be dissolved
because com-
plainant ow-
ed defendant
other debts,
when no part
of the de-
mand the
judgment
was recover-
ed on was
justly due.

As to the second objection to the decree on part of Davis, if there had been any thing due to Phelps of the judgment at law, on any of the breaches for which the judgment was recovered, it would have been correct to have dissolved the injunction for that amount. But it was improper to dissolve the injunction for any more. Any balance due, for which judgment was not recovered, the court ought to have rendered a decree against Davis, for the amount, and after the debt due the Stones was paid, to have retained the title, and enforced the lien of Phelps on the land for the payment thereof.

As to the costs at law, we cannot say that the decree was too rigorous against Davis to permit him to stand chargeable therewith. We have seen that he was in default and did not do every thing which he ought to have done. And although the Stones were

Party in de-
fault cannot
be released
from the cost
of the action
at law.

**DAVIS vs.
Phelps.**

is the wrong in demanding more than they were entitled to, yet this did not excuse Davis from doing any thing or attempting to do any thing on his part. He might have tendered the right sum, and if refused brought his bill to redeem, in the first instance, against both Phelps and the Stones, instead of doing nothing till he was awakened by the suit of Phelps, to bring this suit to get clear of the judgment against him.

Dry ought to be given to pay the Stones, after their account is ascertained, as well as to pay Phelps the balance after it is ascertained, and if not paid, the land ought to be sold, first for the benefit of the Stones, and Phelps to take the balance after all credits are given to Davis, charging Davis with the principal, legal interest after the demand was due, and the costs at law, and crediting him with the rents, and all payments which he may make, or is bound to make, to the Stones, after the rents are credited on their demand. The lien of the Stones to be extended to the whole land, and that of Phelps against Davis to the part sold to Davis, and after sale, if a balance is due to Phelps, not discharged by the sale, Phelps is to have a decree therefor, deducting the costs of this suit.

Mandate.

Decree reversed with costs, and cause remanded for new proceedings and decree, not inconsistent with this opinion.

Turner and Caperton for appellants; Breck for appellee.

CHANCERY.

White &c. vs. Clarke.

Case 134.

Error to the Madison Circuit; GEO. SHANNON, Judge.

Dower. Mansion house. Rent. Executors and administrators Interest. Refunding bond. Practice. Costs.

December 1.

Judge OWSLEY delivered the opinion of the court.

Bill by Turner Clark for distribution.

TURNER CLARKE, one of the children and distributee of the estate of his father, Jesse Clarke, deceased, filed his bill in equity against Durret White and Lucy his wife, who was the widow

and administratrix of the deceased Jesse Clarke, and others, to compel an account of the personal estate, the hire of the slaves, and rent of the land belonging to the estate of the said decedant Jesse.

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VS.
CLARKE.

The cause was prepared as to all necessary parties, for hearing, and interlocutory decree pronounced, and an account taken by a commissioner appointed for that purpose, in pursuance thereof, and finally, a decree entered in favor of Turner Clarke, against White and wife, for nine hundred and eight dollars and seven cents, that being the amount of Clarke's distributive share of the estate as reported by the commissioner.

Decree of the circuit court for Clarke.

This sum was in part produced by charging White and wife with the rent of the plantation, upon which the decedant, Jesse, resided at his death, up to the time of taking the account, and among other objections to the decree, it is contended that, as the widow of her former husband, Jesse Clarke deceased, the now Mrs. White was entitled to the mansion house and plantation rent free until dower was assigned her, and as that was never done, it is insisted that White and wife should not have been charged with the rent of the plantation.

Rent of the mansion house and home farm charged the widow, not endowed, in her administration accounts, by the circuit court.

It was doubtless correct to charge them with the growing crop which was upon the land at the time of the decedant, Clarke's, death. That is expressly declared to be assets in the hands of the executors, or administrators, by act of the Legislature of this country, and is, of course, subject to distribution as personal estate.

Growing crop is assets in the adm'r's hands.

But with the exception of the crop which was growing upon the land at the death of Jesse Clarke, we think no charge should have been made against White and wife, for the use or rent of the mansion house and plantation. As dower was never assigned her, Mrs. White, who was the widow of Clarke, had an unquestionable right to tarry in the mansion house and plantation thereto belonging, rent free; and though she has not continued to reside in the house, yet as she and her husband White, have continued the use and enjoyment of the house and

Widow, is entitled to the use of the mansion house and farm attached, until dower is assigned, whether she resides there or not.

WHITE &c.
vs.
CLARKE.

plantation, we apprehend they ought not, according to a fair and liberal construction of the act of the legislature on that subject, to be charged with the rent.

This right of the widow does not extend to enlargement of the farm.

It is, however, the mansion house and plantation thereto belonging, as the plantation was at the death of Clarke, and not as it might be extended or enlarged thereafter, that Clarke's widow was entitled to use and enjoy rent free, until dower assigned her.

White and wife should, therefore, be charged with the rent of the land which has been cleared since the death of Clarke, after making a just and suitable deduction for the clearing, and keeping the same in repair.

Directions for making up the administratrix's accounts.

With respect to the personal estate, both as to that which was sold, and that not sold, as well as the debts owing the decedant, a charge should be made against White and wife.

After ascertaining the amount thereof, a deduction should be made for funeral expenses and debts owing by Clarke at his death, and from the residue, a commission of five per centum, for administering the same, should be taken, and after crediting the remainder with one third of its amount, for the widow's part, the balance will be the amount of the personal estate, to which the children of Clarke, there being four in number, will be entitled. One fourth of that balance should be charged against White and wife, in favor of the complainant, Turner Clarke.

Interest ag't adm'r for her use of the money.

And as they are alleged in the bill to have used and made profit of the same, and the allegation is not denied, they should be charged with interest thereon, after the expiration of one year from the death of Clarke, the ancestor, observing at the same time, to give the proper credits for payments made to the complainant, and expenses incurred for his benefit.

Directions for the application and distribution of the hire of the slaves.

A charge should also be made against White and wife, for the annual hire of the slaves, allowing a reasonable deduction for hiring each year, and also for keeping such of the slaves as were unable by their labour to pay the expenses of their keeping.

One third of the profits of each year's hire, should be deducted for the widow's thirds, and the fourth of the remainder should be charged against White and wife, in favor of the complainant.

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This annual charge, when thus ascertained, should be made to carry interest from time to time, as it shall be found to have become payable, observing to allow and make the proper and just deductions, from time to time, for the maintainance and necessary expenses in clothing and educating the complainant, whilst he was unable by his labor to pay for his support; and observing also to make all necessary and just deductions for payments &c.

After proceeding in the manner pointed out, as to the rent of the land cleared since the death of the decedant, Clarke, the hire of the slaves, and the proceeds of the personal estate, the aggregate amounts of the different remainders which may be found in favor of the complainant, should be decreed to him, against White and wife, providing, however, by the decree for indemnity to them, against future demands which may come against the estate, by requiring bond and security to be executed by the complainant, before he is allowed to enforce the payment of the amount, which may be so ascertained to be coming to him.

Decree should provide that bond to refund in case of future demands ag't the estate be given by distributees before payment.

The decree must be reversed with costs, the cause remanded to the court below, and an account there taken, not inconsistent with the principles of this opinion, and such further orders and decrees there made as may conform to the usage and principles of equity.

Mandate.

Turner for plaintiffs; Caperton and Breck for defendant.

REPLEVIN.

Jarman vs. Patterson.

Case 135.

Error to the Madison Circuit; GEO. SHANNON, Judge.

Constitutional law. Slaves. Patrols. Nuisance. Statutes. Judicial power. Distress for rent. Justification by under warrants.

December 1. Judge MILLS delivered the opinion of the Court.

Writ of replevin by Jarman for a slave.

THOMAS JARMAN issued his writ of replevin against Patterson, for a negro man slave.

Patterson's avowry, justifying the taking, under the warrant of the trustees of Richmond.

Patterson avowed the taking of the slave, and pleaded, that at the time of the taking, "He was the jailor of Madison county, duly qualified as such; and that on the twenty-first day of June, in the year one thousand eight hundred and twenty, and long before and since, Joseph Turner, Howard Williams, William Diehl, Richard Sampson and John Miller, were trustees of the town of Richmond, duly elected and acting as such; and that said trustees, on said day, made an order, directed to the said defendant, jailor as aforesaid, authorizing and requiring him to receive into his custody the said negro slave, in the declaration mentioned, and him safely keep, in the jail of Madison county, for the space of ten days from that time, and until his prison fees should be paid by his owner, or some person for him: it appearing to the satisfaction of said trustees that said slave came within the 5th section of an act to amend the several laws regulating the towns of Richmond, Harrodsburg and Hopkinsville, passed at the last session of the legislature, all which will more at large appear from said order, which is now here shewn to the court; by virtue of which said order, the said defendant took and received into the jail of Madison county the body of said negro slave, and detained him therein, in obedience to said order, which is the same taking and detaining complained of in plaintiff's declaration, and no other; all which he is ready to verify; wherefore he prays judgment, &c."

Replication of Jarman.

To this plea the plaintiff replied, that he ought not to be barred; "because he says, that the said order of the trustees, set forth in the said plea, was made without any previous notice being given to the plaintiff, or said slave, of said proceeding, or any

previous trial had, whereby to try and convict the said slave of any offence, for which he was liable to be committed, as in said order is directed; to which notice and trial the plaintiff and slave were entitled by the laws of the land. And so he says said proceedings are illegal and void; all which he is ready to verify, &c."

JARMAN
VS.
PATTERSON.

The defendant demurred to this replication. The plaintiff joined in demurrer, and on argument the demurrer was sustained, and judgment was given for defendant; to reverse which this writ of error was prosecuted.

Demurrer to the replication, and judgment for defendant.

The act of assembly under which the slave was imprisoned, reads as follows:

"Be it further enacted, that if any slave shall be found going at large in Harrodsburg or Richmond, working for himself or herself, or contracting or dealing for himself or herself, for more than one day at a time, (any colorable or pretended hiring to the contrary notwithstanding) it shall be lawful for the trustees of such towns to cause said slave to be hired out to the highest bidder for the term of ten days, or to commit such slave to jail for ten days, and until his or her prison fees are paid by his or her owner. The money received for such hiring to go in aid of the funds of the town."

Statute under which the trustees of the town acted.

It will be readily seen, that the issue of law made up in this cause, is designed to question the validity of the act of assembly, and the authority thereby delegated to the trustees, on the ground of their unconstitutionality.

Constitutional law.

It cannot be pretended that any rights secured to the slave by the constitution, are infringed by this act; for there are no rights secured to slaves by the constitution, except the right of trial by a petit jury in charges of felony, and a power granted to the legislature to compel their masters to treat them humanely.

Slaves in Ky. have no rights secured to them by the constitution, except of trial by jury in cases of felony.

Slaves, although they are human beings, are by our laws placed on the same footing with living property of the brute creation. However deeply it may be regretted, and whether it be politic or

In other respects, slaves are regarded by our laws,

JARMAN
vs.
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as in Rome,
not as persons,
but as things.

Statute authorizing the trustees of Richmond and other towns, to cause slaves going at large, hiring themselves and trading, in their towns, to be committed to jail or hired out, without notice to their owners, is valid.

Legislative power over private property for public purposes, and to prevent its use to the injury of the public, consistent with the constitution.

impolitic, a slave by our code, is not treated as a person, but (*negotium*,) a thing, as he stood in the civil code of the Roman Empire.

It is then to the rights of the master guaranteed by the constitution, that we must look in deciding this question. If in the provision in question, the rights of property in the master are infringed to a degree forbidden by the constitution, then we may say that the act is invalid. But if the legislature, in regulating this property, has not exceeded their constitutional limits, then the act must stand and be enforced, whether it be politic or not. We are not aware of any constitutional provision in favor of the rights of the master, violated by this provision.

It is true that one of the objects avowed by the constitution for its own adoption, is the security of the enjoyment of life, liberty and property. It is true that the citizen cannot be deprived of his life, liberty, or property, unless by the judgment of his peers, and the law of the land. But it is equally true, that considerable latitude is left to the discretion of the legislature, in controlling property for public purposes, and to avoid public injuries. We say *public* purposes and *public* injuries, for we do not contend for a power in the legislature to appropriate private property to private purposes, or recognize a right to transfer the estate of A. to the use of B. without the consent of the owner. Such an interference with the rights of property is not now to be considered. It is true that compensation to an individual is secured by the constitution before his estate can be applied to public uses; but still there is a considerable scope of power, uncontrolled by this provision, within which the legislature may regulate the tenure, and control the use of property, and such a power is necessary in all well regulated governments.

It is a maxim indispensable to the well being of society, *sic utere tuo ut alienum non ledas*: use your own so as not to injure the rights of others. This maxim will be often violated by the lawless, and to preserve and enforce it, even in favor of individual rights, belongs to the legislature.

"We must so use our own, as not to injure the rights of others."

It is on this principle, that the erection of any branch of business, or unclean and unhealthy substance placed by A. on his own land, injurious to the health and comfort of his contiguous neighbor, may be demolished, or removed as a nuisance, and A. be made liable in damages for the injury.

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vs.
PATTERSON.

Nuisances.

It is also on this principle, that, by the common law, one citizen may distrain the cattle of another, damage feasant on the soil of the former.

Distress of
beasts dam-
age feasant.

It is on the same ground that the legislature has allowed one citizen, who has a lawful fence to kill the cattle and horses of another, after so many repeated breaches.

Rights to de-
stroy cattle
for repeated
breaches of
lawful fences.

It is by the same rule that the custody of gunpowder, in a place where its explosion may destroy the estates of others in cities or elsewhere, may be restrained by proper regulations.

Deposits of
gunpowder
may be pro-
hibited,
where dan-
gerous.

But without citing more instances: the legislature has controlled, and restricted the management of slaves, the very property now in question, by numerous provisions, prior to the constitution, existing at, and since its adoption. If found without a pass on the plantation of another, and without lawful business, they may be chastised by the owner or overseer, by the infliction of ten stripes, and the owner or overseer, is compelled under the penalty of a fine, not to let such loitering slaves remain there.

Slaves found
on the plant-
ation of oth-
ers, without a
pass or lawful
business, may
be chastised.

A patrol appointed, may apprehend them, and inflict stripes, at the discretion of the captain of the patrol, not exceeding a certain number.

Power of pa-
trols.

Of the same character, is the provision in question, authorizing these trustees to apprehend a slave improperly indulged to the prejudice of society. If the use of any property can be thus restrained, certainly that of slaves needs it more than any other; for to the power of locomotion, they add the design and continuance of human intellect, and of course are more capable than other animals to injure and annoy society, if let to pass unrestrained, without the control of master or overseer; and if such a practice could not be restrained without the

Statutes for
the punish-
ment and im-
prisonment of
slaves, found
at large, with-
out the forms
of judicial
proceedings,
or notice to
their owners,
are necessary
and valid.

JARMAN
vs.
PATTERSON.

forms of judicial investigation, and notice to the master, then all the injury might be sustained before an appropriate remedy could be applied. This provision is therefore founded on the principle of compelling the owners of such property, so to use it as not to injure and annoy the rights or repose of others, and instead of infringing the constitution by destroying the secure enjoyment of property, it only compels a proper use of it, so as really to secure the enjoyment of others.

These statutes do not deprive the owner of his property without the judgment of his peers.

But it may be said that if this be disposing of property according to the law of the land, it is doing it without the judgment of the peers of the master. This is not correct. It is true the measure, or such like instances of managing this property is done by the way of preventive justice, through the instrumentality sometimes of private individuals, or of patrollers, or as in this case of trustees of towns.

To justify the damage the owner of the slave sustains by his imprisonment, under color of the laws prohibiting their wandering at large, the defendant must shew the case existed to justify their arrest.

But the rights of the master, as we shall see in the sequel, are not concluded thereby. He has a right to investigate the matter before a jury, in the tribunals of his country, by proper action, in which it is incumbent on the party who attempts to execute the provisions of the statute, to verify every fact necessary to shew that the slave was acting in violation of the provisions of the statute, and was guilty of the acts which authorized his apprehension, or restraint. Thus the individual, or patroller, or trustees, act at their peril, subject to damages, if the case does not come within the law. Upon the whole, we conclude that the legislature in this instance did not exceed its powers, and has done no more in the powers conferred on these trustees than is, and has been conferred on others, who are not judicial officers; the object of which, is a proper restraint of slaves, in such manner that the property and rights and enjoyments of others may be kept secure from their depredations. It is true, the similar instances of the restraint of slaves and of other property which we have cited, have not been frequently, if at all, questioned in our courts of justice. But their long existence, both before and

since the adoption of the constitution in Virginia, while a colony, and a republic, and ever since this State had existence, and the universal acquiescence in them, shows that their constitutionality have not been doubted.

JARMAN
vs.
PATTERSON.

But admitting the act to be constitutional, and that it did, in truth, authorize trustees to treat slaves according to the provisions thereof, there is still a defect in the avowry of the defendant below, which must be fatal.

Avowry defective.

In many cases where slaves are to be regulated and punished, those who apprehend them are directed, by numerous statutes, to take them before a justice of the peace, at whose adjudication, stripes or imprisonment are directed, and in such trials, nothing is said about notice to the master before the judgments of the justice or justices of the peace are rendered, and of course they are often inflicted *ex parte* as to the masters. Whether such adjudications are enquirable into, when questioned in an action at law, or whether like proceedings *in rem*, they are conclusive upon the rights of the master, and all concerned, although no notice of the proceeding was served on him, is a point which we need not now investigate; for no such case is before us.

Query. Is the *ex parte* judgment of the justice ordering a slave found from home to be punished, conclusive in an action by the owner.

The power here is delegated to the trustees of the town, and they are not judicial officers, and cannot be constituted such by any act which the legislature might pass to that effect. The constitution has fixed the mode, or modes, in which all our judicial officers must be appointed, and none can exist in this community, but such as are thus appointed and commissioned, and none can be created by legislative act.

No judicial power can be conferred on the trustees of towns, or others, by legislative act, nor otherwise than in the mode prescribed by the constitution.

These trustees, therefore, must be considered as ministerial officers, to whom this power is confided, and, as said before, they act at their peril, and must shew, when their acts are questioned, every material fact, to bring the case of the slave within the act, and it is not sufficient to allege that they *decided* that the slave came within the act. Their decision proves nothing; but it ought to be shewn by proper

Hence the decisions of the trustees of towns, committing slaves to prison, have not the effect of judgments.

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plea, that the slave was guilty of the very acts, for which the act authorized his apprehension and incarceration.

Avowry of the jailor, in an action of replevin by the owner of a slave, committed by the trustees of a town, for going at large, working, and trading for himself, must aver that the slave was in fact guilty of the offence.

Here the avowry of the defendant does not shew that the slave was guilty of the offences prohibited by the act, but that the trustees had decided that the slave came within the act. This would have been an insufficient justification for the trustees. They could not be authorized to give any adjudication which would conclude the rights of the master, and their acts were enquirable into. The avowry for this defect must fall, unless the case of the jailor is different from that of the trustees if they were sued in this action.

Nor are we able to perceive any difference in this case, between the case of the jailor, and that of the trustees, especially in an action of replevin, whatever may be the case in an action of trespass.

Query. Whether such would be the rule in the action of trespass.

Ministerial officers may justify, under a warrant issued by competent judicial authority, not void on its face otherwise, where the officer issuing the warrant has not judicial power.

It is true that a ministerial officer, particularly in an action of trespass, may generally justify under a warrant from a judicial officer, unless the warrant is void on its face, or is issued in a case, over which the judicial officer has no jurisdiction, and that want of jurisdiction appears on the face of the warrant. But not so, where the authority comes from a source not judicial, and a ministerial officer is directed to aid in its execution, as the jailor is in this case. He must, like those who gave him his authority, look to its rectitude, and act at his peril, and justify and sustain the act where it is questioned, especially where he has taken and holds the custody of the property, and replevin is brought to regain its possession. If this was not the case, then the action of replevin, as to him, would be destroyed barely by the exhibition of the authority under which he acted, and the possession of the estate could not be regained; though wrongfully withheld.

Distress for rent in England, and how officers there may justify.

In cases of distress in England, it was originally done by the landlord, or his baliff constituted for the purpose, and the baliff stood in the same situation with his principal, who appointed him, when replevin was brought. Afterwards, by statute, the

landlord in some cases was allowed to call a constable, or some ministerial officer, to his aid, and still that officer, as far as we have been able to discover was not protected in replevin, except by matter that would justify, or excuse the landlord. Indeed at common law, the acts of constables acting under warrants, were strictly scrutinized in actions brought against them, for executing such process, until the statute 24 Geo. 2. c. 44, which was never in force in this country, and which relieved them from the burden of deciding whether the process was right or wrong: 2 Stark. Ev. 811.

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But the courts of this country have, by their decisions, shielded such officers in a great measure; but no case has gone so far as to estop a plaintiff in replevin from enquiring into the authority of the officer, when that officer did not act under judicial authority. It was therefore, incumbent on the defendant here, to avow and show that the slave was guilty of the very facts which brought him within the act in question, instead of shewing that the trustees had so decided. For the want of such averments his avowry is bad, and his demurrer ought to have been overruled.

Justification
of officers in
this country
under war-
rants.

Judgment reversed, with costs, and cause remanded with directions to overrule the demurrer, unless the defendant shall obtain leave to amend the avowry by tendering issuable matter, and for such other proceedings as shall not be inconsistent with this opinion.

Mandate.

Monroe for plaintiff; *Caperton* for defendant.

CHANCERY.

Burnham vs. Oldham &c.

Case 136.

Error to the Madison Circuit; GEORGE SHANNON, Judge.

Vendor and vendee. Set off in equity. Dower.

December 2. Judge Owsley delivered the Opinion of the Court.

Contract for land.

BURNHAM purchased a tract of land of John R. Oldham, took Oldham's bond for a title, and his separate covenant to deliver the possession, and at the same time Burnham gave his notes to Oldham for the purchase money.

Judgment for part of the purchase money.

One of the notes, for \$250 in Commonwealth's bank paper, afterwards, by assignment, was transferred to Crews, who brought suit thereon against Burnham, and recovered judgment at law for the amount thereof, Crews having endorsed his willingness to accept bank notes in payment of the judgment.

Judgment on the obligation to deliver possession.

Burnham brought suit at law against Oldham, upon the covenant to deliver possession, and recovered judgment for \$71, and cost.

Bill for the title; decree and conveyance accordingly.

He also brought a suit in chancery for a title, and having obtained a decree therefor, a conveyance was accordingly made by a commissioner appointed by the court for that purpose, and the deed approved and recorded.

Burnham's bill for set-off against the judgment.

After this, Burnham filed his bill in equity, with injunction against the judgment recovered by Crews, in which he sets out the preceding facts, charges that Oldham's wife has not relinquished her dower to the land purchased by him, and threatens that she will never do so; that Oldham is insolvent, and unable to pay the damages recovered by him in the action on the covenant, for the delivery of possession; that the entire possession has never as yet been delivered; and he claims compensation for the rent of the land, which has accrued since the judgment on the covenant. He prays that the damages recovered in the action upon the covenant, the rent of the land which has since accrued, the cost of the suit at law, and the cost of the suit brought in chancery for a title, be set off against so much of the judgment of Crews, after reducing that judgment

to its value in specie, and also that such decree be rendered as may secure Burnham a just indemnity against the claim of Oldham's wife for dower in the land.

BURNHAM
VS
OLDHAM &c.

On hearing, the bill of Burnham was dismissed, with cost and damages, and he appealed.

Decree of the circuit court.

The equity set up on account of the failure of Mrs. Oldham to relinquish her dower, is, under the circumstances of this case, of no avail. Having brought suit, obtained a decree for a title, and accepted the conveyance made by the commissioner under the decree, it is too late now for Burnham to object to paying for the land on the ground of possible danger from any future claim which may be asserted by Mrs. Oldham for dower, even were it admitted that the claim of Mrs. Oldham for dower might have been availing, (but which is not intended to be decided) if the suit had not been brought for a title, and the conveyance made.

Payment of no part of the purchase money can be resisted on the grounds of the claim of vendor's wife to dower, after a conveyance obtained by suit in equity.

Nor can the claim for accruing rents, since the judgment recovered by Burnham on the covenant, be sustained. In the action upon that covenant, breaches were assigned for not delivering the possession of the land, and having recovered judgment at law, equity cannot give its assistance by again trying the breaches of the covenant, and assessing damages beyond what has been found by the jury at law.

Vendee cannot set off against part of the purchase money the damages sustained for the retention of the land in possession by vendor subsequent to a recovery on the covenant to deliver the premises.

The damages recovered at law ought, however, we think, to have been set off against the judgment of Crews. Those damages were assessed for the breach of a covenant, which formed a part of the consideration of the note upon which the judgment of Crews was recovered, and ought, therefore, in equity and justice to be applied in extinguishing so much of Crews' judgment as will be equal in amount to the damages and cost, after reducing that judgment to its specie value. The cost of the suit in chancery for a title, upon the same principle, forms a good set off. Those costs are incidents to the same contract, and should be applied in extinguishing the judgment of Crews in the same way.

But the judgment so recovered may be set off in equity, because of the connexion.

The decree must be reversed with cost, the cause

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Mandate.

remanded to the court below, and, after taking the account according to the principles of this opinion, the injunction must be made perpetual for so much as the complainant, Burnham, may be found to be entitled to a set off for; and as to any balance of the judgment, the injunction must be dissolved, with cost and damages.

Turner and Breck for plaintiff; Caperton for defendant.

CHANCERY.

Tevis's representatives vs. Richardson's heirs &c.

Case 137.

Appeal from the Madison Circuit; GEORGE SHANNON, Judge.
Specific performance. Time. Possession. Title. Decrees against unknown heirs. Femmes Covert.

December 2.

Judge MILLS delivered the opinion of the court.

Bill for specific performance.

THIS is a bill in equity, brought by the heirs of Aaron Richardson against the heirs and executors of Robert Tevis deceased, to enforce the purchase of a tract of land.

Contract for the sale of the land descended from Richardson, made by his four sons and two sons-in-law to Tevis.

Richardson died in possession of the land, a number of years before the sale; and on the 26th day of July, 1821, his heirs set up the land at public auction, and Robert Tevis became the purchaser, at the price of \$13 31¼ per acre, the number of acres being about 146, and executed to said heirs separate notes for the purchase money, payable in one year. Each note expressed on its face that it was executed for the land, and that a title was to be made to the land on the payment thereof. The heirs of Richardson were six in number, four of them were males, and two were married women. The male heirs and the two husbands of the females executed to Tevis their contract or title bond, binding them to make a good and sufficient deed for the land when the purchase money was paid.

Part of Richardson's heirs bring their

It is stated by the parties that, after the notes fell due, suits at law were brought thereon, and the defendants, the heirs and executor of Robert Tevis, (he

having departed this life,) pleaded the non performance of the condition mentioned in each note, to-wit: the not making of a title, and the heirs of Richardson failing in the issue, suffered a nonsuit. The records of these suits at law are, however, not filed. On the 3d of March, 1824, two of the heirs of Richardson and the husband of a third, (his wife having died in the mean time,) brought this bill to enforce the contract specifically, making the rest of the heirs of Richardson, as well as the executor and heirs of Robert Tevis and others, defendants.

TIVIS' rep's
vs.
RICHARD-
SON'S HS &C.
—
bill against
the other
parties for
execution of
the contract.

The heirs and executor of Robert Tevis resist the specific performance of the contract on various grounds. One is, that the land was sold for paper of the Bank of the Commonwealth, but the notes were drawn, through ignorance, inadvertance or mistake, for dollars only, omitting the expression of bank paper, and that the vendors had refused to receive the paper; and another ground is an entire defect of title in the vendors, and an inability to make such title as a court of equity ought to compel them to take.

Grounds of
defence to
the bill by
the represent-
atives of
Tevis.

The court below decreed a specific performance entirely, and from that decree the heirs and executor of Robert Tevis have appealed to this court.

Decree of the
circuit court
for the exe-
cution of the
contract, and
appeal.

We conceive a specific performance of the contract ought not to have been decreed under the circumstances of this case.

The history given of the title, is, that a patent issued to John Tanner, for the land, in 1785; that Tanner sold it to Nathaniel Hart, in his life time, but no conveyance is shewn to have existed from Tanner to Hart. Tanner, long since, as the bill alleges, left the state, and is dead, and his heirs, except one of them, are unknown. His known heir and his unknown heirs are made defendants. Hart died, and left the estate to numerous heirs, who are also made defendants. It is alleged that the heirs of Hart made partition, and the land in question fell, in the partition, to two of them, Richard and Cumberland Hart, to whom the rest of the heirs conveyed by deed of partition, but no such deed is shewn.

History of
the title of
Richardson's
heirs.

TAVIS' rep's
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RICHARD-
SON'S hs &c.

It is stated, that Richard and Cumberland Hart sold and conveyed the land to Tyree Oldham. Oldham is made defendant, and although a recorded conveyance to him from Richard and Cumberland Hart is alleged, yet it is not produced. It is further stated, that Tyree Oldham had sold and conveyed to Aaron Richardson, the ancestor of the complainants, by a recorded deed, but no such deed is produced. Oldham, however, is made defendant, and does not resist a conveyance, neither do the rest of the defendants through whom it is stated the title has passed.

Equity will not enforce a purchase, where the vendor cannot recover at law, except where the complainant shews a sufficient excuse for his failure, or that his forfeiture of his contract at law had been waived by the vendee.

After all these defects of title, it would be difficult to sustain a bill on the part of the vendors for a specific performance, notwithstanding all the intervening claimants in the chain of title are made parties, and do not resist it, when that bill is brought for the first time about two years after the contract ought to have been fulfilled. Regularly, the vendors ought to have been ready at the time of the conveyance and payment to furnish *their abstract of title*, such as their contract required, and to have offered a conveyance. This, at all events, was necessary to give the vendors a right to recover on the contract in a court of law, and generally where the party has no right of action at law, a court of equity will not interfere to enforce a contract, unless there have been some circumstances excusing the failure at law, or waiving the forfeiture on the part of the vendor. Here there are no such circumstances on the part of the vendor, or his heirs.

Proposition of the vendee to take the title, such as it was, if the vendor would receive payment in the depreciated currency, not having been acceded to, given no effect.

It is true that it is shewn that Tevis said he would take the title as it was and carry the contract into effect, if the vendors would take the common currency of the country, which was the depreciated paper of the banks, and which he contended was to be the medium of payment. But at the same time used expressions shewing that he understood that the title of the vendors was defective and that his contract entitled him to a clear title, and that he would not waive any of the defects, if the currency was not accepted.

It is true that it is often said that time is not es-

teemed in equity the essence of a contract. But it ought not to be understood from this, that time is to be disregarded, whenever the loss of it can work an injury, especially where the parties have made the contract materially dependant, and remedies at law are gone, and there is no waiver of the forfeiture at law.

It is, however, insisted that the possession here is with Tevis and his heirs and has not been disturbed. But this of itself is not sufficient to waive the forfeiture, especially as he resisted before the hour that the contract fell due, and ever since, both in the actions at law and in the intercourse between the parties, the fulfilment of the contract, as the other party construed it. For this possession, if the land belongs to the vendors, the laws will give them ample redress. It is not an irreparable injury, but can be compensated.

It might be a question of some moment whether a court of equity, when a good and sufficient title is stipulated to be given, ought to compel a vendor to accept a title derived through a proceeding in chancery against unknown heirs.

It is an *ex parte* proceeding, and liable to be assailed in many ways, and must therefore be strictly pursued, as it goes against a defendant by not a very definite description of character, without even naming him, when his name is given to identify him. If there be a will, and the title has gone to a devisee as such, or is held by purchase and not by descent, the proceeding against the unknown heirs, it is evident, cannot be effectual.

But without being understood to express any positive opinion on this point, there are greater difficulties. For however the general rule may be, it is evident that the proceedings here do not conform to the statute. There is no oath by the party filing the bill against unknown heirs, that their names are to him or them unknown, but the oath is made by a stranger to the controversy, and not nearer connected with it, than as counsel in the cause, that he verily believes that the names of these heirs are

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Time may be material where the contract is mutually dependent, and the remedy at law is not lost, and the forfeiture not waived.

Possession by vendee, not of course a waiver of vendor's forfeiture of his contract by his failure to convey.

Query: whether a purchaser can be compelled to accept a title obtained by a decree against unknown heirs.

Where the land had been devised or conveyed, the decree against unknown heirs is nought.

That the decree against unknown heirs, is erroneous; for the lack of the affidavit is an objection to the title thus obtained.

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son's he &c.

known to his clients. It has been held by this court that the want of the proper oath does not render such proceedings void; but still they are evidently voidable and may be reversed for this defect, and hence, the title forced upon the purchaser is liable to be assailed and destroyed by the acts of another defendant over whom he has no control.

Printer's certificate, after the appearance day for the absent defendant, stating the order had been published 9 weeks, not saying when, is insufficient, and the decree void.

There is another apparent defect in the proof of the order of publication here, which is calculated to render these proceedings against the unknown heirs, not only voidable, but void. The order was made at the March term, 1824, requiring the defendants to appear on the first day of the next June term, which was the first Monday of the succeeding June. The certificate of the printer, states that the insertion was made for nine weeks successively, but it does not state when the nine weeks commenced, or when they ended, and his certificate is dated on the 11th of the following June, so that the certificate would have been equally true, if the last of these insertions had been made after the appearance day, as if made before. Nothing ought to be presumed in favor of such *ex parte* proceedings, and they have ever been held to considerable strictness in the court. This proceeding against the unknown heirs are not therefore deemed sufficient to authorize the enforcing of the title upon the vendee.

Purchaser cannot be compelled to accept a title made out by presumption from length of possession held by vendors under executory contracts.

One ground relied on by the complainants as rendering the title indefeasable, and such as ought to be accepted by the vendee, is, that the possession of the land under Tanner's grant has been held somewhat upwards of twenty years, and therefore time has completed the title. It is true that this raises a considerable presumption in favor of the vendors, that there has been a conveyance or some writing, or permission to occupy the land; but still we cannot deem the proof sufficient to say, that the title is complete thereby.

Effect of possession in perfecting and proving titles to land: Pur-

If the danger to this possession arose from adverse interfering claims, and it was shewn that the land remained vacant until possessed by Tanner, and those who claimed under him; and there were no exceptions in favor of claimants within the disabili-

ties of the statute, such possession of twenty years under one statute, or seven years under another, might give a complete title; because no person could recover in a writ of right after the twenty years had expired, unless a previous, actual seizin was proved according to the settled course of adjudication in this court. But here the danger is from the same title, and it has been held by this court that where a tenant holds by executory contract still looking to the legal title holder for a completion of his title, and the relation exists of vendor and vendee, with an incomplete estate, then the statute does not run. It requires a conveyance to authorize the vendee to hold adversely against all the world especially his own vendor, and such a conveyance cannot certainly be presumed. The description of the heirs of Tanner is not given except one, and she is a *feme covert*, of course one of them is within the disabilities of the statute, and when these heirs are rightfully proceeded against they are not precluded from shewing circumstances sufficient to rebut the presumption of a conveyance. Of this danger the vendee, who is to have a good and sufficient title, ought not to be compelled to run the risk by a decree in chancery made in a suit for specific performance, brought years after the contract ought to have been fulfilled.

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chaser not
bound to run
the risk in
such cases.

There is also another defect existing in the sale from the heirs of Richardson to Robert Tevis, which we apprehend is incurable and ought to be held conclusive against a decree for specific performance.

Contract for
sale of land
by the hus-
bands of the
femes owning
the fee, can-
not be enforced
without a
privy exami-
nation of the
femes, and
their free con-
sent entered
of record.

The sale as to two sixths of the land was made, and the title bond given, by the husbands of the female heirs alone. The females did not sell, and they could not do so, unless by privy examination as the law requires, and that has not been done. King and wife, one of these females, are made defendants, to compel her to convey. We do not conceive that the chancellor ought to specifically enforce a sale of the wife's land in fulfilment of the contract of the husband alone. If he does, it ought to be under some circumstances of her consent, granted on record similar and equivalent to a privy examination.

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Equity never
has coerced
the wife to
relinquish her
right of dower.

Equity will
not aid the
husband to
get possession
of any of the
wife's choses
in action,
without providing
for her.

Infant children
of the
deceased wife
cannot be divested
of the fee in lands
descended on
them from
their mother,
to fulfil their
father's contract.

Effect of the
vendee's acceptance
of a deed of conveyance,
in fulfilment
of the contract,
as a waiver of
vendee's objection
to the title.

An instance has not been known of a chancellor decreeing away the dower of the wife, and compelling her to relinquish it in fulfilment of the contract of the husband, and we are not aware that his powers are greater over the wife when she holds the estate, than when she holds the contingent estate of dower only.

Besides, the wife holds her interest notwithstanding the marriage, and even in estate in which the husband acquires the absolute interest by the marriage, if it has never been reduced to possession, the chancellor will frequently refuse to aid the husband in regaining the possession unless a suitable provision is made for the wife, placed beyond the control of the husband; and this has been done in this court even where the rights of creditors are concerned. It follows, therefore, conclusively, that the chancellor ought to take care how he decrees away the wife's legal estate, encumbered by the marriage in fulfilment of the contracts of the husband.

What makes the matter worse in this case, is, after the sale by the husband of one of these married females, she departed this life, leaving two infant children. The husband united in this suit, and requires of the chancellor to decree away the estate of the infant heirs of his wife, whom he makes defendants in fulfilment of his own contract, and not in compliance with the contract of the mother. Such a decree cannot be rendered against them, or against the surviving female, and if rendered would be reversible at their writ, so soon as their respective disabilities were removed, and therefore the vendee ought not to be compelled to accept a title under such a decree.

The only cure to all this, attempted on the part of the complainants, is, that before the title was to have been made, they executed a conveyance and had it properly acknowledged in the clerk's office, and that it was accepted by Robert Tevis in his lifetime, through the instrumentality of his son as his agent. If this allegation was true it would go far to defeat the jurisdiction of a court of equity, and would render it hard to account for a defeat at law. If the

title was absolutely made and accepted there would be no need for the chancellor to interfere, except to enforce the lien; for it is to enforce liens, or enforce contracts specifically, that the chancellor will take the entire control over such contracts for the sale of lands.

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vs.
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But here the proof fails and does not prove the acceptance of the deed. The son tendered the amount due in bank paper to one of the complainants who had the deed in the clerk's office acknowledged as hereafter described. The paper was refused and so was the deed, which shews no more, than that the vendee was willing to waive the defects of title, if the controversy relative to the acceptance of bank paper was waived on the other side, and this coincides with the language of the vendee afterwards, that they had made him a deed which he would not accept, if they would not accept the payment in bank paper.

Deed was not
accepted.

The deed is produced, and has some minutes on it made by the clerk, and is not recorded, because it was not accepted as explained by the testimony of of the clerk, in accordance with the usage of the office, not to record a deed, unless it was first accepted. These minutes made by the clerk are abbreviated notes, from which he was afterwards to draw out the acknowledgment in words at length, which, when explained by him, amount to the fact, that the deed was acknowledged by the males, and that the females relinquished their dower. How clerks have got into the habit of certifying that *femes covert* have relinquished their dower or title, instead of certifying the fact that they have acknowledged after being privily examined as the law directs, a deed, which by its terms in law passes their estate, we cannot tell; but if it be conceded that the certificate of the clerk, stating that the *feme* relinquished her dower, must be construed to pass her dower, if any she has, it certainly cannot be contended that her relinquishing her dower, passed the estate when the fee simple is in her. This can be done only by certifying that she acknowledged the conveyance in the terms pointed out in the statute. This deed there-

Certificate of
the clerk,
that the *feme*
covert relin-
quished her
right of dower
in land she
held the fee
simple in,
does not pass
her estate.

Tevis' rep's
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SON'S hs &c.

fore did not pass the title of two sixths of the land, except such title as the husbands acquired by the marriage, and it was right in Tevis, for this defect, if no other to reject it, and it was erroneous in the court below, to decree that this conveyance should stand as a good conveyance of the title of the land, as to the heirs of Tevis, as was done by the decree.

Bill to be dis-
missed as to
the vendees of
complainant.

We therefore conclude that no relief ought to have been granted the complainants in the court below, as to the executor and heirs of Tevis, and that as to them, the bill ought to have been dismissed with costs.

Leave given
complainants
to proceed
with their
bill to obtain
the title.

As to the other parties concerned, the complainants may be able to show on the same bill, if preferred as their suit ought to be, that they are entitled to a conveyance, especially as they have ground from length of time, for some presumption in their favor; and on the return of the cause, as the decree must be reversed, they ought to be left at liberty to proceed thereon, by a new preparation against the other defendants, if they should deem it proper for the purpose of procuring a title from the heirs of the patentee.

Decree and
mandate.

The decree must therefore be reversed, with costs, in favor of Tevis' heirs and executor against the complainants below, and the cause be remanded, with directions to dismiss the bill as to Tevis' heirs and executor, with costs, and for new proceedings against the defendants not inconsistent with this opinion, and the rules and usages of a court of equity.

Turner for appellants; Caperton and Breck for appellees.

Wood &c. vs. Sayre &c.

Error to the County Court of Fayette.

MOTION.

Case 138.

Sheriffs. Regimental paymasters. Militia fines. Damages. Interest. Statutes. Parties to motions. Construction.

Judge MILLS delivered the Opinion of the Court.

December 2.

THIS is a judgment rendered by the county court, in favor of the paymaster of a regiment, against the sheriff and his sureties, for failing to account for the fines put into his hands for collection, by the colonel of the regiment.

Motion by the regimental paymaster vs. the sheriff and his sureties.

The court rendered judgment for the amount of the fines, with fifteen per cent damages, and five per cent interest thereon. This interest and damages it is insisted, is erroneous; and other errors are assigned.

Judgment for the principal, damages, and interest.

The act of Assembly, or that section thereof, which regulates the motion, reads thus:

Statute authorizing the recovery against the sheriff and his deputies, for failing to account for militia fines.

"But in case the said sheriff shall fail, or refuse to pay, and settle with the paymaster as aforesaid, the paymaster shall immediately proceed to recover the monies due from the said sheriff, and his deputies, or either of them, by motion in the county court, in the same manner, that moneys are recovered by the counties, against their public collectors of levy."

It will be needless to refer to the acts regulating the recovery of levies from the sheriff, or public collectors, to ascertain whether the fifteen per cent damages, and five per cent interest, are recoverable, because this act fixes the amount to be recovered, by the words the "moneys due" without saying anything of damages or interest, and not leaving grounds for inference, that interest and damages were to be added. It cannot be inferred from the expressions "the same manner that moneys are recovered by counties." For it will be seen that in these latter recoveries, damages and interest are not annexed.

Sheriffs are not liable by motion for damages or interest for failing to account for militia fines: the sum due only is recoverable.

But as the judgment is to be disturbed on this account, another question is to be considered, not named in argument; and that is, the propriety of bring-

Are the sureties of the sheriff liable to be joined.

Wood &c.
vs.
SAYRE &c.

in the motion
against the
sheriff in such
case?

ing the joint notice against the sheriff and his sureties. The act recited does not tell us against whom the recovery is to be had, but in case of the sheriff's failure, directs the moneys due to be recovered, not saying against whom, but "in the same manner" that counties recover their levies. Of course it would seem to follow, that the recovery must be had against the same description of persons of whom counties recover their levies. It is worthy of remark, that we are not referred to the mode in which county creditors recover their demands against the collectors of levies, but to the mode in which counties recover their balances in the hands of their collectors, unaccounted for.

Statute of
1797, giving
to the county
court the mo-
tion against
the sheriff for
failing to ac-
count for the
county levy:
2 Dig. 856.

The first statute on this subject which we shall notice, as one to which we are referred, is in 2d Dig. L. K. 856, and reads thus:

"And it shall and may be lawful, where such sheriff or collector fails to account with the county aforesaid, for the court of that county before whom he ought to account, to enter judgment against such delinquent sheriff or collector, for whatever shall appear to be due from such sheriff or collector, and a-ward execution thereon, giving such sheriff or collector ten days previous notice of such proceeding."

Here we find that not only the damages are omitted, as before suggested; but the sheriff or collector alone is named, against whom the motion is to be brought, and nothing is said of the sureties; and it evidently follows, that the remedy by motion does not lie by this act.

Act of '95, (1
Litt. L. K.
202, omitted
in the Digest)
giving to the
county court
the motion
against the
sheriff or his
sureties for
failing to ac-
count for the
levy.

But there is another act on this subject, omitted in the digest of the statutes, probably because it was supposed to be entirely superseded by the act last recited. But as this act, from which this provision is cited, contains no repealing clause, and there being some little variance between them, especially with regard to sureties, we must take the latter into consideration. It will be found in the 1st vol. Litt. L. K. 202, and is to this effect:

"They, (to-wit: the justices of the county courts) shall have power to call on the present and former

sheriffs or collectors, for a settlement of their accounts, and may appoint two of their own body to settle with such sheriff or collector, and make a report of such settlement to the court; and if, on such settlement with any sheriff or collector, they may be in arrears to the county, the court shall give judgment and award execution for the sum that may appear due from such sheriff or collector, or against their securities, executors, administrators or legal representatives. Provided such sheriff or collector, his or their securities, executors, administrators or legal representative, have ten days previous notice of such motion."

WOOD & Co.
vs.
SAYRE & Co.

Both these acts must be taken as acts in *pari materia*, as relating to the same subject, and operating on the same legal proceedings. The first in the order of time, is the last which we have recited. The subsequent act omitted saying any thing about the sureties of the sheriff or collector; but it did not expressly repeal the former act, nor is there any provision in it incompatible with the first act; the first must consequently be considered in construing the latter act, and the effect will be, to insert in the latter act the provisions of the former touching sureties.

The act of '95 was not repealed by the act of '97, but must be taken together, and the motion lies against the sheriff's sureties.—

But after this addition is made to the latter act, we are still unable to sustain this notice. For it is against the sheriff and his sureties both, and the act which subjects the sureties as well as the sheriff, authorizes a several proceeding, either against the sheriff or his sureties, but not against both. The authority is to move against the "sheriff or collector, or against their securities," not "and their securities." We would readily conclude that the legislature intended both to be included in one proceeding, as more safe to the rights of the parties, if there was any thing in the act which would tolerate the construction. The disjunctive "or," is used in other parts of the same sentence in its usual sense, implying severalty: that is, one or the other, but not both at once, and we cannot place any other sense thereon.

But motions against the sheriff and his sureties for failing to account for the county levy and militia fines, cannot be maintained against them jointly, but severally, against the sheriff or his sureties.

Wood &c.

vs.

BAYNE &c.

Mandate.

It therefore follows, that without this act, this proceeding against the sureties at all, is wrong, and with this act, a joint proceeding cannot be indulged. The judgment must consequently be reversed, with costs, and the cause be remanded, with directions to squash the notice, with costs.

Chinn for plaintiffs; *Combs* for defendants.

APPENDIX.

The following decision of the Judge of the fifth Judicial District, in the Jefferson Circuit Court, on the *qualifications of Jurors*, in a criminal cause, is published here, not because it is authority, like the opinions of the Court of Appeals; but because the point decided is one that never has been, and which, according to our present system, never can come before the appellate court: so that this decision is of equal authority with any other given, or which will probably be rendered in Kentucky; and we have not had before in print, the adjudication of any court on this important, legal and constitutional question; and because the authorities are collected and arranged, and the subject discussed, in a manner, and with an ability, that must render the opinion convenient and valuable to the profession.

REPORTER.

OPINION OF THE COURT.

JEFFERSON CIRCUIT, 1830—COMMONWEALTH VS

Trial by Jury. Constitutional Law. Statutes.

JUDGE PIRTLE delivered the opinion.

THE question presented to the Court is: whether it is cause of challenge to a juror called on the trial of a criminal case, that he has formed his opinion from report or information of others? Whatever regards the trial by jury deserves the most zealous attention, and the most careful examination. The third section of an act of the General Assembly, approved 22nd January 1827, provides, "That from and after the passage of this act, on the trial of any criminal case it shall not be held, or considered a good cause of challenge to a venire man, that he has formed or expressed an opinion from mere rumor." The 6th section of the 10th article of the Constitution declares, "That the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate;" and the 10th section of the same article secures to the accused "in prosecutions by indictment, or information, a speedy public trial by an impartial jury of the vicinage." The constitutional validity of this act of the Legislature is involved in this question.

In approaching this subject, I have to lament the absence of such light, as the decisions of my brethren of the Circuit Court bench might afford. They alone have jurisdiction in this kind of case; and unfortunately for the condition of the criminal law in this state, there are no reports of their decisions, and no decisions of a tribunal of general jurisdiction. Hence, each Judge (the British reporters since 1776 having been excluded) is measurably compelled to form his own rules, for his own circuit, resting upon his own judgment, from which there is no appeal. Jargon and inconsistency in the administration of criminal justice in the several circuits,

is the necessary consequence. An evil of such magnitude should strike the attention of every citizen. The justice of a country, should be a fixed principle made known to all, general and uniform in its operations, and not wandering in the arbitrium, or in the various opinions of as many judges, as are appointed to administer it. And perhaps I am now about to consider the question, upon this Act, as *res integra*, when it has been heretofore decided in some of the other circuits.

If the trial by jury had been barely secured by the constitution, and the special provisions had been omitted, I do not know that the judiciary could have considered the indifference or impartiality of a juror, as less indispensable.—The excellence of this mode of trial is in the certain fairness which it promises, from the manner in which it is constituted. But the security it affords the citizen, that his accusation and his defence will be considered by his neighbors impartially, liberally, and without prepossession, would be lost, should any person be permitted to sit as a trier, whose mind was not wholly undecided and indifferent, as to the issue he is called to try. The principles of natural justice demand an unbiased tribunal as strongly as the constitution could.. Who shall say, that he is indifferent as he stands unsworn upon the issue, who will answer upon his *voir dire*, that he has formed his opinion; that his mind is made up? What citizen could believe, that his fellow citizens had done unto him, as they would he should have done unto them, when they had urged him to be tried by men, who answered his interrogatories, on their oaths, that they had made up their minds from "mere rumor," and did believe him to be guilty? What citizen in the community would be willing to commit the trial of a civil case, which involved his home and fireside, to twelve men, who had formed their opinions against his cause upon any grounds? With what injustice might he not reproach the law, that compelled him? Can his country be less regardful of his fame, his liberty, his life! The common law made no distinction between rumor and knowledge of facts, as to the opinion formed by the juror. That he had an opinion formed of the guilt or innocence of the accused when he came to the book, was a principal cause of challenge, and he was rejected, without referring it to the triers of challenges to say upon what he had formed it. And, by what perspicacity it is seen, or by what doctrine of metaphysics it is ascertained, that he who forms his opinion upon rumor is more impartial than he who forms his opinion upon facts within his knowledge, I cannot understand.

He who has formed an opinion on the facts, that have come to his knowledge, has more probably formed it from unstained motives of justice, and with a mind open to correct impression, than he, who has been so heedful of 'mere rumor,' as to make up his mind upon the guilt or innocence of any person, without waiting to hear the testimony by which alone that person is to be acquitted or condemned. The juror whose opinion is formed from rumor, may have been induced to such a conclusion from some personal prejudice, of which he is, himself unconscious, or, from a reliance upon the relation of some friend, in whose honesty and truth he will have more confidence, than in the testimony of witnesses, who are unknown to him; or he may perchance have come to the opinion of guilt, from the absence of the ordinary charities of humanity, (for such our experience and observation will tell us is sometimes the case) or, the natural incapacity of his mind to weigh circumstances, discriminate, and judge for himself. All these, and many other causes, disqualify him, or may disqualify him, to collate with accuracy the circumstances that shall be given him in evidence, and to weigh with impartiality the accusation and the defence. He who has formed his opinion before he has

heard the testimony, may hear with patience, and decide with an uninfluenced and correct judgment upon the facts—but the law should not entrust its justice to such hazard. It should be sure—and confident as human means can assure it, that justice will not suffer in the tribunal. “For as much,” says Sir Edward Coke, “as men’s lives, fames, lands and goods are to be tried by jurors, it is most necessary, that they be *omni exceptione majores*.” 1st Inst. 156 a.

But the constitution has secured to the citizen “the *ancient mode* of trial by jury.”—And, not content with that, the convention have provided “an *impartial* jury of the vicinage.” What was the *ancient mode*, and who were considered *impartial*, by the law, may be seen by a reference to the authorities upon the law of that country, whose just boast it has been for ages, and from which we have received the trial by jury. Lord Coke, in 1st. Inst. 156 b. lays down this general proposition, with regard to the impartiality of a juror, “He ought to be least suspicious, that is, to be indifferent as he stands unsworn: and then he is accounted in law *liber et legalis homo*; otherwise he may be challenged and not suffered to be sworn.” And this word, ‘impartial,’ is not confined by the English common law to the exemption from personal favor, or ill will; but he is deemed *partial* or unindifferent, by the books of the common law, who entertains any favor or ill will toward either party, or, *whose mind is made up upon the case*. Gilbert, in his Hist. Com. Pl. says, it is a principal cause of challenge to a juror, “if he has declared his opinion touching the matter”—and clearly refers the ground of the objection to partiality. See Tit. Chal—Bac. Abr. 3. vol. 258 is to the same effect—rather more express—Vide, also 2 Tidd. 780. Hale’s Hist. Com. Law, Cap. 12. Buller’s Nisi Prius, 307. 1 Salk. 153. Rolle’s Abr. 655. “If a juror has declared the right of one party, it is a principal cause of challenge,” 49 Ewd. 3. is quoted. Brooke’s, Abr. Tit. Chal. Pl. 90 to the same effect: 21 Hen. 7, 29, is quoted.

In 1696, when the judiciary was more independent, and the rights of the subject better defined and understood, than at any previous time in England, Peter Cook was tried at the Old Bailey, for high treason: upon his trial he thus addressed the court: “My Lord, before the jury is called, I am advised, that if any of the jury have said already, that I am guilty; or they will find me guilty, or I shall suffer, or will be hanged, or the like, they are not fit or proper men to be of the jury.” To which Lord Chief Justice Treby replied, “you are right, sir; it is a good cause of challenge.” Justice Rokeby said, “that will be sufficient cause if, when they come to the book, you are ready to prove it.” Justice Powel said, “in a civil case, it would be a good cause of challenge if a man have given his opinion about the right one way or the other.” Treby Ch. J. went on to remark, “but if any man in this pannel have any particular displeasure to the prisoner, or be *unindifferent*, or have declared himself so, I do admonish and desire him to discover so much in general; for it is not fit for the honor of the King’s justice, that such a man should serve on the jury.” In these books, the motive, as far as regards the opinion of the juror, or the ground upon which the opinion is formed, is not inquired into. That an opinion has been formed at all is deemed sufficient to exclude the juror from the panel.

There are indeed several books, that express a different doctrine, founded upon two cases in the Year Books; one the 7th of Henry 6th, and the other, the 20th of the same King. In Rolle’s Abr. 650, it is thus laid down, (I believe I quote literally in translating the Norman,) “If a juror say, that he will find for one party, this is a good challenge for favor, if he spoke it from favor, 7 H. 6, 25.” “But, if he said it not from favor, but

from the knowledge which he had of the matter in issue, it is no good cause of challenge for favor, 7 H. 6, 25."

"It is no challenge to a juror, that he said, that he was disposed to find for one party, if it be not found by the triers, or by the court, that he said it more from favor than from the truth of the matter, 20 H. 6, 40."

This doctrine is also contained in *Trials Per Pais* and in *Viner's Abr.* and the same *Year Books* cited.

But these cases seem not to allude to an opinion formed upon rumor, and do not touch the question here; unless they apply to all opinions formed; and spoken upon any grounds, other than ill will or favor. But, how little less than ridiculous would it be in practice, to attempt to ascertain whether the juror spoke "more from favor than from the truth of the matter." If he have spoken an opinion at all, nothing but omniscience, nothing less than divinity itself, can tell, whether he said it more from one impulse than another. We cannot see the process by which his thoughts have been formed, or lay open the motive, which induced him to utter them. What were the different modica in the balance of his judgment—how much of *simplex*, how much, but blind indignation at crime—how much of a spirit: a to contrive at offences—and how much of the "truth of the matter," may be often as difficult for the party himself to know, as it is absurd to propose for judicial solution. "The truth of the matter" is what is to be examined upon the trial of the issue, not on the selection of the jury. I cannot find any other case in the old books where this doctrine is expressed—and these are combatted by the other two ancient cases which have been quoted, the 49th E. 3, and 21 H. 7, 29. Sergeant Hawkins, Lib. 2 Cap. 43. Sec. 28, quotes the case of 7 H. 6, and also of 21 H. 7. "It hath been allowed, (says he,) a good cause of challenge on the part of the prisoner, that the juror hath declared his opinion before oath, that the party is guilty, or will be hanged, or the like; yet it hath been adjudged, that if it shall appear, that the juror made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge." In the first clause, he quotes the latest authority, and in the last, the 7 H. 6, containing Justice Babington's charge to the triers in an action of replevin. The opinion of such a lawyer as Sergeant Hawkins, would alone deserve high respect; but he makes these quotations without expressing any opinion upon them; and he so informs us in a subsequent section. A more modern compiler pretends to support the doctrine of the 7 H. 6. Chitty's Cr. L. 1st vol. 542. "Thus if a jurymen has expressed his wishes as to the result of the trial, or his opinion of the guilt or innocence of the defendant with a malicious intention, on evidence of these facts he will be set aside." How he could express his opinion of the innocence of the defendant, with a malicious intention, Mr. Chitty does not inform us. He quotes Cooke's case in the *State Trials* before cited, and 2 Tidd. 780. There is no such doctrine in either authority; and the adjunct "with a malicious intention" is the invention of Mr. Chitty, and a perversion of the authority, from which he quotes the principal text. All the books, except the two before referred to, say, it is cause of principal challenge, to have expressed an opinion; if so, it cannot depend upon the motive with which it is formed, or spoken; for upon the principal challenge the motive was not in question, according to the British practice, and could only be put in examination upon challenge to the favor. There is indeed a late case *Rex. vs. Edmonds*, 4 Barnewall and Alderson's Rep. in the King's Bench, 1821, in which Chief Justice Abbot seems to have forgotten the doctrines of more enlightened jurisprudence in his own country, and to have wandered back to the rude and ignorant

days of four hundred years ago; to a date before the art of printing had shed its light upon the world, and long before a book upon a legal subject was permitted to be printed in England. He quotes the two cases, to which I have referred in the reign of Henry 6, and decides the question upon their authority. The Year Books are only valuable as a faithful picture of the early state of the law. In a recent case in the Common Pleas, when the counsel cited the Year Books as authority, the Court, with some sharpness, asked him to "come to something within three hundred years;" so I would say to the judge who quotes these cases, come to something within three hundred years, and you will find them overruled, and their doctrines proscribed; as well by the express decisions of the most learned judges, as by the spirit of more intelligent times, when civil rights were better defined, and stood on more permanent bases. Who shall send us back to the days of the Lancasters, the Tudors, or the Stuarts—to the times of High Commission and Star Chamber, when the weight of the throne crushed to extinction the best rights of the English people? We might as well be referred to cases upon unlawful imprisonment in the times of the Red and White rose, or in the reign of Richard the Third, to illustrate "the privilege of *habeas corpus*," secured by our Constitution, as to the seventh or twentieth of Henry the Sixth, for the mode of trial by jury to which the Constitution alludes.

But, if this doctrine of impartiality were not sustained by the decisions of the Courts at Westminster, it still has been abundantly protected by the American statesmen and jurists. In this country, more than any other, has the trial by jury been cherished and improved. The Constitution of almost every State has secured its impartiality by special clause. The Constitution of the United States has the same provision. And the Courts of America, in expounding these provisions, have held forth the lights of modern improvement, and shown, that American justice requires a jurymen whose opinion is not formed, by any means that govern the human mind, before he hears the evidence in the case, which he is called to try.

We are not under the necessity to recur to the British common law, for the exposition of an American charter.

The House of Representatives of the United States, in 1804, gave a strong expression of the opinion of that respectable body on this subject, by founding the second article of the impeachment against Judge Chase, upon his having decided, that John Basset was a competent juror in the case of Callendar, although he had made up his mind from report or rumor, with regard to the publication on which the indictment was found. The counsel of Judge Chase relied upon the doctrines held in the two cases quoted in Rolle's Abr. which are extracted from the Year Books before cited. But the Judge forbore to cite them in his response, and placed his defense on other grounds, more creditable to his learning and his principles. In the course of his defence he admits and asserts the doctrine I contend for to be correct. "The law (says the response) has therefore established a fixed and general rule on this subject, to secure to the party accused, as far as in the imperfection of human nature it can be secured, a fair and impartial trial. The criterion established by this rule is, that the juror stands indifferent between the government and the person accused, *as to the matter in issue*, on the indictment." In 1806, upon the trial of T. O. Selfridge, before Mr. Justice Parker of the Supreme Court of Massachusetts, the proceeding is thus reported: When Thomas Fracker was called to the book—"Mr. Selfridge: I wish to enquire if Mr. Fracker has not formed an opinion on this occasion? Mr. Fracker being sworn to

answer, was asked by *Parker J.* Have you heard any thing of this case, so as to have made up your mind? Ans. No.—*Parker J.* Do you feel any bias, or prejudice for or against the prisoner at the bar? Ans. No.—*Parker J.* Swear him." Ward Jackson was called—"Mr. Selfridge: I wish Mr. Jackson to say whether he has not some bias in this case? Mr. Jackson being sworn, &c. *Parker J.* Have you formed any opinion as to the issue of this cause? Ans. No.—*Parker J.* Do you feel any bias or prejudice for or against Mr. Selfridge? Ans. None.—*Parker J.* Swear him." See the Trial, page 9. Here we see an opinion from "rumor" was deemed sufficient ground of challenge by an intelligent court; and to have formed an opinion as to the issue, without subjoining ill will or favor, rendered a juror partial within the meaning of the Constitution.

On the trial of Aaron Burr, in 1807, what opinion should be deemed a sufficient ground of challenge, was a question made to the court, and argued zealously by the counsel—1 vol. p. 379. When a juror was called to the box and interrogated, Chief Justice Marshall said, "The simple question is, whether the having formed an opinion, not upon the evidence in Court, but upon common rumor, render a man incompetent to decide upon the real testimony of the case?" The counsel examined; and the juror said, he had formed his opinion upon rumors—but that he would not, if he were a jurymen, form his opinion upon such rumors.—The court decided, that he was not an impartial juror. In page 415, Chief Justice Marshall, in delivering the opinion of the court after the argument, says, "I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the constitution, must be composed of men, who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it. This is not to be expected, certainly the law does not expect it, where the jurors before they hear the testimony have deliberately formed and delivered an opinion, that the person, whom they are to try is guilty or innocent of the charge alleged against him. The jury should enter upon the trial with minds open to those impressions, which the testimony and the law of the case ought to make, not with those preconceived opinions, which will resist those impressions."

The able and conclusive argument delivered in this case by that learned and great man, of whose talents his country will be justly proud for ages, should itself have established the American doctrine, had there not been another judicial word on this subject in all our books.

On the trial of Robert M. Goodwin, before the court of General Sessions in New York, in 1820, the question on the opinion formed from mere rumor, was made, and the court decided that it affected the juror's impartiality, and he was rejected. See the trial, page 57. Afterwards, on the second trial before Mr. Justice Platt of the Supreme Court, the same practice was pursued, and the jury selected of the same qualifications, upon interrogatories of the like kind on the part of the court—the Judge explicitly acknowledging the doctrine to be correct. See the Trial, pages 231, 2, 3, 4, 5, 6. Upon the trial of Merchant and Curtis in Massachusetts, before Mr. Justice Story, in 1826, every one was rejected, who had formed an opinion upon the case. And in the case of *Vermilven et al. vs The People*, before the Supreme Court of New York, in 1827, the same doctrine is expressly recognised. A principal of about the same import seems to have been laid down by our court of Appeals, in 3; Bibb 347; 4 Bibb 192, and 4 Lit. Rep. 118.

If the Legislature have the power to restrict the right of the challenge as in this Act, by virtue of the same power it might be enacted, that those

should not be challenged who had formed their opinions upon any other grounds, which the act should point out—whether upon their own *sight* and *view* of the occurrence only, or upon their *hearing words* only, or upon a conversation with *one* man, or *two* men: or as to time—that those should not be challenged whose opinions had not been formed more than a *day*, or a *week*; and so on, as to any other grounds which a metaphorical caprice might select. May the “impartial jury” of our ancestors, the “impartial jury” of the constitution be saved from the meddling hand of restless experiment?

We boast that the principles, that secure the civil rights of mankind have taken better root in our soil, and grown with a more lively luxuriance; that whatsoever we have derived from the old world has improved in our hands; that the germs and scions which we have transplanted, in this rich ground of liberty, have grown into spreading stateliness—may truth always sustain our exultations! On the 1st of January, 1826, an Act of Parliament went into operation, of sixty one sections, guarding and protecting the trial by jury, by the most comprehensive and minute provisions. Could not the government of that country rebuke our boast? might they not say, that while we were undermining the fabric, and pulling away its corner stone, the British Legislature was carefully throwing around it a rampart of security?

I have considered this subject with much interest; feeling duly sensible of the attention and respect, with which a judge should consider an act of the Legislature, and mindful of the responsible duty I owe to the country, which has placed in my hands the supervision and control of this kind of trial. The paramount authority of the constitution commands the judge to hold the “ancient mode of trial by jury sacred”—It is his duty, to whom it is intrusted by the People, to look upon it, and see, that the right thereof remains inviolate; to stand by it, watch it, and guard it, the convention having deemed it a Vestal fire, the waning of whose flame augurs destruction to the justice of the Republic.

This court is therefore of opinion, that so much of the said act of the General Assembly as restricts the right of challenge to jurors, is in derogation of the rights and privileges of the good citizens of this state, unconstitutional and void.

The court does not mean to say, that every hypothetical opinion, which a juror may have, will disqualify him, (for this might exclude all mankind that come within reach of the court) as, that, if what his neighbors have said be true, or if what was rumored be true, then he has formed an opinion. But, if his opinion is absolutely formed and his mind made up, it makes no difference on what grounds, he is an incompetent jurymen. But, it may be said, that the more atrocious, and notorious an offence is, the more difficulty there will be to obtain a jury; and, in some instances of out breaking enormity, it may be impossible. Not so: That there will be more difficulty is acknowledged, but the injunction, to preserve impartiality will not compel the court to deny justice to the commonwealth. The constitution directs the trial to be had by a *jury of the vicinage*—It is the duty of the court to afford it *there*, and, if a jury, clear of all previous impression cannot be obtained, it will be still the duty of the court to provide the most impartial triers, which the constitution and laws have given the means to do.

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1 Where a defendant to the original bill files a cross bill, making his co-defendants and others defendants, and the original and this cross bill are each dismissed, the appeal of the original complainant, does not bring the decree dismissing the cross bill before the court. *Stevenson & wife vs Dunlap's & Bleights' heirs,*

139

2 An appeal by the complainant, brings into this court, all the parties to his bill and the decree as they stood below. *Stevenson, &c. vs Dunlap, &c.*

139

3 Where the appeal bond is not executed in the time prescribed, or not by the proper persons, there is no appeal, and the judgment may be executed. *Clinton, &c. vs Phillips' adm'r.*

118

Appeal Bond.

1 Where the appeal bond is not executed in the time prescribed, or not by the proper parties, the judgment is not suspended. — *Clinton, &c. vs Phillips' adm'r.*

118

2 Such cases will be struck from the docket of the court without damages or cost. *Ibid,*

118

Appearance.

A party who appears in this court, shall be considered before the circuit court, upon the return of the cause. *Benley vs Gregory, &c.*

369

Arbitrement and Award.

1 Expression of an opinion by arbitrators in their report, not taken as an award. *Dicken vs Griffith*, 606

2 Submission of an action of ejectment does not authorize an award, that one party convey a part of the land to the other. *Ib.* 607

3 An agreement by one of the lessors, extending the terms of the submission, is not binding on the others, and consequently cannot embrace all the controversy.—*Ib.* 607

4 An award in an action of ejectment, that one of plaintiff's lessors has good title to part of the land in a certain deed, and that he convey the balance to defendant, is not valid. *Ib.* 608

5 Judgment on such an award, that plaintiff recover his term &c. not warranted. *Ib.* 608

Assignments.

See Set-off in Equity, 191

1 Transfer of a promissory note, by an infant himself, is voidable only, but made by his attorney in fact, is absolutely void. See Infant, 301

2 It seems that the assignment of a bond for the conveyance of land, made after the cancelment of the contract between obligor and obligee, confers on the assignee, the right to recover for the improvements obligee had made on the premises. *Ballard vs Stephenson*, 365

3 Assignment of a demand in a suit does not vest the assignee with such legal right as to enable him to maintain an action at law against the agent of the plaintiff, who, having conducted the suit, settled the controversy, and re-

ceived the money, after notice of the assignment. *Boyd vs Snelling*, 416

4 Between assignees of a chose in action, the prior assignee prevails. *Talbot vs Cooke*, 439

5 Assignee, and mortgagee of assignee, have each equities to be preferred according to priority. *Madeiras vs Callett*, 477

Assignor and Obligor.

Assignment of an obligation for Land after the original parties had agreed to cancel the contract, still confers on assignee the right to recover for the improvements obligor had made. *Ballard vs Stephenson*, 365-7

See Assignor and Assignee.

Assignor and Assignee.

1 Assignor of a bond for land, must take a deed expressing the consideration obligor received: not the price of the assignment. *Sproule, &c. vs Wynan's heirs*, 196

2 Assignee of a bond for land, in case of a cancelment of the contract with obligor, is entitled to the value of the improvements assignor had made on the land. *Ballard vs Stephenson*, 365-6

Assignor and Obligor.

3 Payment for the improvements by the obligor to the obligee, made after his notice of the assignment of the bond for the land, is no defence to the claim of the assignee. *Ballard vs Stephenson*, 366

4 Where the assignee obtains a judgment for an alleged breach in the covenant to convey for the nominal amount of the consideration money and interest, and the obligor comes with his

bill, alleging the prior cancellation of the contract, he must pay the value of the improvements, deducting the rents.—Complainant must do equity before he can ask it. *Ib.* 365-7

Assault and Battery.

Damages in the action of the husband for the battery upon the wife, or the father on the daughter, are not limited to the value of the services lost by the plaintiff: but may be assessed for the injury to the feelings of the parties, and character of the family. *Trimble, &c. vs Spiller,* 395

Assets.

Their appropriation among creditors. See *Ex'ors. & Adm'rs.* 413-14

Growing crop is assets in the adm'rs. hands. *White, &c. vs Clarke,* 641

Assize of Nuisance.

Not maintainable after the abatement of the nuisance by the injured party: but case may be brought for the damages. *Tate vs Parish,* 327-8

Assumpsit.

1 This is now the remedy of one surety against another for contribution. 403

2 Assignee of a demand in suit cannot maintain this action against the agent of the nominal plaintiff who received the money after notice of the assignment and paid it over to assignor. *Boyd vs Snelling,* 416

Attorney in Fact.

See Judgment, 449

See Powers of Attorney.

— Principal and Agent.

Attorneys at Law.

Their compensation for services to guardian, &c. See Guardian and Ward, 166

Their purchases of land under clients executions. See Sheriff's Sales, 616

Auditors in Chancery

They ought not to be appointed until the Judge has heard the cause and fixed the principles on which the account is to be made up.—*Kay vs Fowler,* 595

Auditor of Public Accounts.

He cannot be made party by an officer of the government, and the state be thereby virtually subjected to suit. *Devine vs Harvie,* 442

See Commonwealth: 6. 441-2

Authority.

By letters of Attorney. See Powers of attorney, 96

See Executors and Administrators, 310

Avowry.

1 Avowry of the jailor, in an action of *replevin*, by the owner of a slave, committed by the trustees of a town, for going at large, working, and trading for himself, must aver that the slave was in fact guilty of the offence. *Jarman vs Patterson,* 650

2 Query. Whether such would be the rule in the action of trespass. *Ib.* 650

Award.

See Arbitrement and Award, 606-7

Bail.

Bail to the action, who entered in-
to the recognizance under the
act of 1821, cannot be charged
without shewing a *ca. sa.* return-
ed, though that writ was abol-
ished by the Statute, and so the
scire facias cannot be maintain-
ed. *Petec vs Ousley*, 130

Banks.

See Powers of Attorney, 96

— Custom of Banks, its effect, 98

Bank Note Contracts.

See Usury, 336-354

1 Contracts for the payment of
Bank notes, including within
them other stipulations, are not
within the act authorizing the
recovery of Bank notes in kind.
Townsend vs Burgher, 224

2 Endorsement of the declaration
by the plaintiff, that the Bank
paper would be received, does
not empower the court to render
judgment for the paper in kind,
in a case not within the statute.
Owens vs Holliday, 297

3 In case of covenant for bank
notes, within the act authorizing
the recovery in kind, the judg-
ment ought to be only for the
nominal amount to be discharg-
ed in the bank paper. *Ib.* 296

4 In cases within the statute allow-
ing a recovery in kind, and
where the endorsement is made,
no jury is necessary to assess the
damages: otherwise in cases not
within the act. *Forean vs Bow-*
en, 410

5 This court cannot judicially know

the notes on the Bank of the
Commonwealth was below par
in value in 1825. *Bell vs Wag-*
goner, 524-5

6 Where an obligation is written
by mistake, for money, instead of
commonwealth's bank notes, the
chancellor will not allow the
creditor to insist on the paper;
but the specie value of the paper
when due, with interest, is the
amount of the demand. *Davis*,
&c. vs Phelps, 635

Bar by Former Decision.

1 One judgment in ejectment is
no bar to another action, at
common law. *Speed, &c. vs*
Braxdell, 571

2 Statute of Kentucky on this sub-
ject does not apply to judg-
ment rendered before its pas-
sage. *Ib.* 571

3 Decree dismissing a bill, brought
on an entry, to obtain a release
of an elder grant, is not a bar
to an action of ejectment by
the complainant against the de-
fendant. *Ib.* 571

Bar by Lapse of Time.

1 The lapse of five years is a bar
to a bill in equity for the per-
formance of a parol contract for
land, of which complainant had
not held the possession: as it is to
an action at law. *McMillin vs*
McMillin, 567

2 Exceptions anciently allowed to
this rule not latterly indulged;
but the Statute law of limita-
tions more strictly followed.—
Ib. 567-8

2 Five years adverse possession by
the purchaser of a slave from the
mortgagor, will bar the mortga-
gee's bill. *Young &c. vs Wise-*
wan, 271-2

Baron and Feme.

See Husband and Wife.

Bills in Chancery.

See Bills Quia Timet. Injunctions.
Specific performance of Contracts. Rescission of Contracts.

Practice, Pleading and Parties in Chancery, &c. &c.

Bills of Exchange.

- 1 Notary's certificate of Protest is sufficient evidence of the demand of a foreign bill. *Tyler vs Bank of Ky.*, 556
- 2 Only contra case is British post-revolutionary and not law. *Ib.* 556
- 3 A bill of exchange drawn in Ky. and addressed Mr. J. I. W., N. Orleans, is "a bill drawn upon a person out of this state," within the meaning of the 5th sec. of the act of 1798, and damages were recoverable on it.—*Wood vs F. & M. Bank of Lex.* 283
- 4 Otherwise held in *Hopkins vs. Clay*, 3 Mar. 448, where by previous agreement, the bill was accepted by Hopkins in Kentucky, where he resided. *Ib.* 284
- 5 Distinction in the cases, held material by justices Owsley and Mills; not by the chief justice. *Ib.* 285
- 6 Actions of debt on notes discounted at Bank of Ky. made bills of exchange, against principal and endorser, must be for the debt, interest and costs of protest, and not maintainable for debt only. *Noel and Pope vs Bank of Kentucky.* 400
- 7 Statute of Ky. makes the protest of the notary sufficient evidence of the demand and non-payment of all foreign bills and

negotiable notes placed on their footing. *Tyler vs Bank of Ky.* 557

- 8 Bill of exchange, drawn in Illinois, by a resident of that state, on another resident, is inland, and the protest of a notary not necessary, and of course is not evidence of demand and non-payment. *Taylor vs Bank of Illinois,* 579
- 9 It is not necessary to give defendant notice to produce the notice sent him of the protest of the bill, to let in the evidence of the contents of the notice sent. *Ib.* 578
- 10 Bill payable so many days after date, need not be presented till due; but if presented for acceptance before, and dishonored, there must be immediate notice. *Ib.* 580
- 11 If the bill be drawn on the cashier of a bank, without funds, or his authority, the bank holding the bill is not prejudiced by sending the cashier abroad, so that the demand could not be made of him in person. *Ib.* 581
- 12 Where there is no place fixed for the payment of a bill, the holder must make diligent search for the drawee, at his residence, or within the realm of England: and here, drawee's absence from the state excuses this duty. *Ib.* 581
- 13 Want of funds in the hands of the drawee of an accommodation inland bill, is no excuse for not giving notice to an endorser entitled to recover of the drawer. *Ib.* 582
- 14 Notice that a notary public had protested an inland bill of exchange, not equivalent to notice of the dishonor of the bill, and is insufficient. *Ib.* 582
- 15 Notice of the dishonor of a bill

put into the Post office at Shaw-
nertown, directed to defendant,
Union county, Ky. where there
were two post offices in the
county, one at the court house,
near which defendant resided,
and the other eight miles dis-
tant, is insufficient. *Ib.*

583

16 Query, if it were proved that
by the practice in the proper
Post office, such a direction
would have carried the letter to
the county seat. *Ib.*

583

Bills Quia Timet.

One having the elder legal title
may have a decree for a release
against another having a con-
veyance from their common
grantor of elder date, but in fact
subsequently executed. *Nantz,*
&c. vs. McPherson,

599

Bonds.

See appeal Bonds. Replevin Bonds.
Bonds Statutory.

Refunding bonds to be given by
Ex'ors. &c. See *Ex'ors.* and
Adm'rs.

643

Bonds Statutory.

For Costs.

Required of non-resident plain-
tiffs in this court. See *Abate-*
ment.

555

Collector of Militia Fines.

His bond is required only to
secure the fines assessed be-
fore his appointment. *Common-*
wealth for Harrison vs Pearce's
Ex'ors.

318

Stipulations of the bond to se-
cure the collection of fines after-
wards to be levied, are ineffectu-
al: because the appointment of
the collector for that purpose is
so far void. See *Ib. Militia*
Fines,

318-9

The conditions of the bond requir-
ed by the statute. *Ib.*

318-8

It should be made payable to the
Commonwealth. *Ib.*

320

Boundaries of Land.

Actual abutals, artificial or natu-
ral, made or adopted by the sur-
veyor, govern the boundary
wherever they are extant, or
their former existence can be
proved. *Baxter vs Evett's les-*
see,

333

Certificates of Printers.

See *Publication Orders*, 216-7, 264-7, 325

Certiorari.

This court will, *ex officio*, award cer-
tiorari where the part of the re-
cord absent may tend to affirm
the decision; and in such case
only. *Hutchison's adm'r. & hs.*
vs Sinclair,

293

Choses in Action.

See *Trusts and Trustees,*

194

— *Assignments,*

437

1 Act subjecting the debts due a
judgment debtor to his creditors,
does not embrace a debt due by
the state. *Divine vs Harrie,*

443

2 Effect of the contrary construc-
tion. *Ib.*

443

3 Same law, it seems, of debts due
from the United States. *Ib.*

443

4 Demand on the state is not a
chose in action, within the stat-
ute. *Ib.*

443

Clerical Mistakes.

Mistake in the opinion of this
court, ordering damages where

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| none were recoverable, might probably be corrected at a subsequent term, as a clerical mistake. <i>Davis vs Ballard</i> , | 604 | Conditions. | |
| See Amendments, | 297 | See Conditional Sales. | |
| Clerk's Fees. | | — Mortgages. | |
| See Fees of Clerks. | 20-1 | — Injunction Bonds. | |
| Collectors. | | Bonds with the collateral condition, meant by the statute, includes all, but those with conditions for the payment of certain sums of money. <i>McGuire vs Trimble</i> , &c. | 122 |
| Of Militia Fines. See Militia Fines, | 318-20 | Conditional Sales. | |
| Of County Levies. See County Collectors. | | Marks distinguishing them from mortgages, | 634-5 |
| Colloquium. | | Confidential Communication. | |
| See Slander, | 315 | See Slander, | 315 |
| Commonwealth. | | Constables. | |
| 1 The State cannot be sued in her own courts. <i>Divine vs Harvie</i> , | 441 | 1 Motions against them for failing to return an execution or pay over money, are barred by the lapse of two years. <i>Harris vs Smith</i> , | 311 |
| 2 There has been no enactment, under the clause of the constitution, which directs the legislature to provide how suits shall be brought against the state. <i>Ib</i> | 441 | 2 In such cases where the demand is below £5 must be made before the Justice of the Peace, <i>Ib</i> | 311 |
| 3 State cannot be made a garnishee. <i>Ib</i> . | 442 | Co-Parties in Suits. | |
| 4 Nor can a suit be maintained against the auditor and treasurer as parties, in place of the State, to obtain a warrant and money from the treasurer. <i>Ib</i> . | 442 | See Costs, | 375 |
| 5 Auditor and treasurer cannot be made parties to a suit, as garnishees or stake-holders of the public money. <i>Ib</i> . | 442 | Co-Tenants. | |
| 6 State is not embraced by an act made to operate between individuals, unless such intention is apparent in the act. <i>Ib</i> . | 443 | See Grants, | 31-2 |
| Competency. | | Consideration. | |
| Of Witnesses. See that head, | 91 | 1 Amount to be expressed in a deed to the assignee of the bond, is the sum obligor received, not what assignee paid. <i>Sproule, &c. vs Wynant's heirs</i> , | 196 |

2 Acknowledgement of the receipt of it in a deed, not conclusive, 292-3

3 Coincidence between the dates and identity of the subscribing witness, to obligations from each party to the other, evidence that one of the obligations was the consideration of the other.—*Aldridge vs Birney, &c.* 347

3 Defence, that the covenant was executed by mistake for too great a sum, cannot be made at law; the remedy is in equity. Otherwise, it seems, where the defence goes to the whole action. *Forean vs Bowen,* 412

Constitutional Law.

1 Statute allowing a replevin of two years held to be unconstitutional as to all contracts made before the enactment, according to *Blair and Williams, &c.*—*Grayson vs Lilly, &c.* 10-11
Stephenson's adm'r. &c. vs Barnett, &c. 50

Chief Justice Bibb, dissenting, 169

See Equity. 12

2 Endorsement that Bank notes would be received on the execution, was not a contract between the parties, and not obligatory on such a plaintiff.—*Grayson vs Lilly and Bullock,* 11

See Equity. 12-13

3 Act of assembly directing sales under decrees in chancery on longer credit than at the date of the contract, unconstitutional, and so far void. *January vs January, &c.* 544

4 Query of the constitutional power of this court to depart from the adjudged cases, and enlarge the equity jurisdiction. *Tribble vs Taul,* 459

5 Powers of the federal govern-

ment, exclusive, and concurrent with, the states. *Taylor vs Bank of Illinois,* 586

6 Where it was stipulated, in a mortgage made before the enactment of the *Relief laws*, that on default of payment, the mortgagee might sell the estate for ready money, the chancellor on being appealed to, after the passage of those acts, was bound to specifically enforce the contract, by a sale for cash in hand; whether those statutes were regarded as constitutional in other cases or not. *Pool vs Young,* 588

7 Such stipulations of the parties, fixing the remedy for a breach of their contract, governs the chancellor, as the law of the case. *Ib.* 589

8 Slaves in Ky. have no rights secured to them by the constitution, except of trial by jury in cases of felony. *Jarman vs Patterson,* 645

9 Exercise of legislative power over private property for public purposes, and to prevent its use to the injury of the public, is not inconsistent with the constitution. *Ib.* 646

10 Statutes for the punishment and imprisonment of slaves, found at large, without the forms of judicial proceedings, or notice to their owners, are necessary and valid. *Ib.* 647

11 Statutes allowing beasts to be killed for breach of sufficient fences, prohibiting deposits of gunpowder, &c., not unconstitutional, but valid. *Ib.* 647-8

12 No judicial power can be conferred on the trustees of towns, or others, by legislative act, nor otherwise than in the mode prescribed by the Constitution. *Ib.* 649

13 Hence the decisions of the trus-

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| tees of towns, committing slaves to prison, have not the effect of judgments. <i>Ib.</i> | 649 | and a warranty in such deed, directed by the decree, operates to pass to the grantee the benefit of all title the party may afterwards acquire. <i>Ib.</i> | 108-9 |
| <i>See Appendix,</i> | 667 | | |
| Construction. | | | |
| Of Devises, | 388-91 | 4 Amount to be expressed in a deed from obligor to assignee of the bond, is the sum obligor received, not what assignee paid assignor. <i>Sproule, &c. vs Wyman's heirs,</i> | 196 |
| Devises of Slaves, | 233 | | |
| See Judgments, | 380 | See Evidence, | 265 |
| — Obligations, | 356 | 5 Prior unrecorded deed is valid against all except purchasers and creditors, and their privies: hence a defendant in ejectment cannot read a subsequent deed to show title out of the lessor, without showing he holds under it. <i>Blight's lessee vs Atwell, &c.</i> | 267 |
| Contracts. | | | |
| See Assignments. | | | |
| — Assumpsit. | | | |
| — Bonds. | | | |
| — Covenants. | | 6 Recital of the receipt of the consideration money in the deed, not conclusive of the fact.— <i>Hutchison, &c. vs Sinclair,</i> | 292-3 |
| — Constitutional Law, | 10-19 | | |
| — Infants. | | 7 One who holds the valid title, and afterwards acquires a bad one, cannot convey or release the latter without the other: both will be passed by any instrument which conveys one.— <i>Blight's les., &c. vs Tobin, &c.</i> | 619 |
| — Rescission of Contracts. | | | |
| — Specific Performance. | | 8 An instrument purporting to be a release of the title made on a deed of conveyance not designating the grantee, cannot pass the title. <i>Garnett, &c. vs Garnett's lessee,</i> | 547 |
| Contribution. | | | |
| Between Sureties. See that head, | 403-6 | | |
| Conveyances. | | | |
| 1 Effect of the conveyance by a commissioner under a decree, is the same as of a deed made by the party according to the decree. <i>Logan vs Steele's heirs,</i> | 107 | | |
| 2 Decree and conveyance by a commissioner, has the effect to pass all the titles the party had, though not sanctioned in the suit. <i>Ib.</i> | | | |
| 3 Commissioner's deeds pass all the title the party has at the time— | | | |
| | | Copies. | |
| | | See Evidence, | 265 |
| | | Corporation. | |
| | 108 | It's existence, where plaintiff, is not put in issue by the plea of non-assumpsit. <i>Taylor vs Bank of Illinois,</i> | 584 |

Costs.

- 1 Costs not allowed complainant in a bill for credits which he had not asked for before suit, and which he obtains but by consent. *Grayson vs Lilly and Bullock,* 14
- 2 Party in default will not be released by the chancellor from the cost of the action at law.— *Davis, &c. vs Phelps,* 639
- 3 Representatives of the original complainant, who paid the cost, allowed in the bill to revive and execute the decree to recover all the costs in exclusion of the other complainants. *Kennedy vs Davis' devisees, &c.* 375
- 4 Mortgagee recovers his costs although the sum he claims in his bill may be reduced. *Ib.* 636
- 5 Costs in such cases ought to be paid out of the proceeds of the sale of the estate. *Ib.* 636
- 6 It seems that where an infant suing by his *prochain ami*, recovers below, and the defendant prosecutes here, and the judgment is reversed, the judgment for costs here, though against the infant, shall be paid by *prochain ami*. *Yeiser vs Stone's heirs,* 189

County Collectors.

- Motions against them for not accounting for the levy, must be against them only, or their sureties: not against both jointly.— *Wood &c. vs Sayre,* 665

County Levy.

- 1 Motions against the sheriff and his sureties for failing to account for the levy, cannot be maintained jointly against the sheriff and his sureties, but against him or them. *Wood &c. vs Sayre, &c.* 665

- 2 Statute of 1797, giving to the county court the motion against the sheriff for failing to account for the county levy: 2 Dig. 856. *Ib.* 664.

Court of Appeals.

- Where only two Judges sit, if they divide in opinion, the decision below will be affirmed. *Faris vs Shanks,* 133

Covenant.

- See Bank Note Contracts, 410
— Performance of Covenants, 545

- 1 An obligation for the hire of a slave, payable in bank notes, and to clothe and return the slave, is not within the act authorizing the recovery of Bank notes in kind. *Townsend vs Burgher,* 224
- 2 Like construction of the act allowing the action by petition and summons on obligations for the direct payment of money.— *Ib.* 225

The Action.

See Pleading by plaintiff.

In Covenant.

- 1 Declaration on a covenant without stating the date, is insufficient. *Hanson vs Cowan,* 575
- 2 Where there is leave to give the special matter in evidence, plaintiff which might be specially pleaded takes upon himself the proof of conditions precedent. *Peebles vs Porter, & Co.* 610

Covenant for Land.

- 1 Where the obligation is to convey on request there must be a demand. *Gibbs and Hardin vs Stone,* 303

2 Notice in writing, sent by obligee, and delivered in his absence to obligor, calling on him for a deed for land, obligor was bound to make on request, is not sufficient, without the bearer was authorized to receive the deed and deliver the bond, or make an acquittance. *Ib.* 203-4

3 In such case the obligor must look up the obligee, and cannot, by such notice, shift the duty off himself upon the obligee. *Ib.* 304

See Pleading by plaintiff, 303, &c.

Creditors.

See *Fraudulent Conveyances.*

1 Judgment creditor only, can question the debtor's fraudulent sale of his property, and the record must always be produced to make out the case. *Sanders vs Vance,* 212

2 Privileged creditors of the deceased must give notice of the claims, in order to have the benefit of their right of precedence. *Pope vs Wickliffe,* 414

Cross Bills.

Appeal from a decree dismissing the original bill, does not of course bring a decree dismissing a cross bill before this court. *Stephenson &c. vs Dunlap &c.* 139

Customs.

Effect of the custom of merchants here, in their transactions in the Bank -- By Judge Mills. *Ward vs Bank of Ky.* 96

Damages.

See Jurisdiction of Courts, 221-2

— Bills of Exchange, 283

See Bank Note Contracts, 410

1 Where an appeal is dismissed for the insufficiency of the bond, but which was executed in due time by the proper person, damages and costs follow. *Clinton, &c. vs Phillips' adm'r.* 118-9

2 Otherwise, where the bond had not been executed in time, or not by the proper person. *Ib.* 118-9

3 Damages in trover and conversion, is the value of the property at the time of the conversion, increased by the interest up to the time of trial, or not, in the discretion of the jury. *Sanders vs Vance,* 213-14

4 In the husband's or father's action for the battery of his wife, or child, the damages are not limited to the amount of her services lost, but may be assessed for the injury to the feelings of the parties and character of the family, as in case of the seduction. *Trimble, &c. vs Spiller,* 395

5 Where the complainant comes to have a set off of unliquidated damages, a jury may assess the amount, 346-7

In Injunction Cases.

6 Where the final decree of the circuit court, awarding a perpetual injunction against a judgment at law, is reversed here, the damages are recoverable though there had been no previous injunction. *Davis vs Ballard,* 604

Debt.

The Action.

1 This action lies on the original judgment after an affirmation here. *Snoddy vs Maupin,* 51

2 On the plea of *nil til record,*

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| an error in the taxation of costs adjudged in the court, is not fatal, but the error may be corrected, and the proper sum recovered. <i>Ib.</i> | See Distributees, | 247 |
| 3 Sum demanded, in the commencement of the declaration, ought to be the aggregate of the several counts. <i>Grant vs Tams, & Co.</i> | — Specific Performance, | 197 |
| 4 No more can be recovered than the amount first demanded, tho' the several counts exceed that sum. <i>Ib.</i> | 51 Where there is a denial, and no proof of assets, the decree must be <i>quando</i> . <i>South's heirs, &c. vs Snelling,</i> | 420 |
| 5 Variance between writ and declaration, ground of demurrer not cured by statute. | 2 Decree against heirs, cannot be <i>quando</i> . <i>Ib.</i> | 421 |
| 6 The action given by statute against all the parties to a bill, must be for debt, interest and cost of protest, | 3 Where there are assets for part of the amount of the demand, the decree ought to be for that sum to be made of the assets in his hand, &c., and for the balance <i>quando</i> . <i>Ib.</i> | 420 |
| Debtor and Creditor. | 4 Between the same parties, founded on facts afterwards involved in a trial at law, evidence to be heard by the jury, but not conclusive. <i>Speed vs Brazdell,</i> | 572 |
| See Constitutional Law, | 5 Against ex'ors, &c. in favor of distributees, ought to provide for the execution of refunding bond. <i>White vs Clarke,</i> | 643 |
| Decree. | 6 Where the land had been devised or conveyed, the decree against unknown heirs is nought. <i>Tewis' reple. vs Richardson's he. &c.</i> | 657 |
| See Sheriffs' Sales, | Deed of Conveyance. | |
| Declaration. | Vendee who has accepted a deed, and received possession, is presumed to have inspected the derivation of title. <i>Payne vs Cabell,</i> | 202 |
| 1 In debt the amount demanded in the commencement, though set forth in several counts, is all that can be recovered. <i>Grant vs Tams & Co.,</i> | See Conveyance, <i>passim.</i> | |
| 2 In ejectment a joint demise is maintained only by shewing title in all the lessors. <i>Smith vs Mahan, &c.</i> | Delivery. | |
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- 1 Existence, loss, and contents, of the affidavit, the dedimus issued upon, may be proved. *Taylor vs Bank of Illinois,*

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- 7 Before the act of '87 the sister of the whole blood inherited the entire estate in exclusion of the brother of the half blood. *Ib.* 42

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8 *Partus sequitur ventrem.*

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9 Devise, that the wife have her dower in such manner as the law directs, gives her an estate in one third of the slaves, for life only. *Dean's heirs vs Dean's ex'ors.*

10 Power given by the testator to his executor, to sell the slaves & divide the proceeds among certain devisees, passes to the executor, and after the widow's death, he shall sell the slaves she had held as dower. *lb.*

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4 It is the duty of executors and guardians to employ able counsel, and they will be allowed in their accounts the customary charges for such services. *Ib.* 166

5 Guardian not allowed to charge his wards with fees of counsel unnecessarily employed to represent him as their co-distributees, before his appointment to the guardianship. *Ib.* 163-7

- 6 Charges of the guardian for an account, in the name of the grandfather, against the wards, for boarding, &c. rejected. *Ib.* 168-9
- 7 Fees of the clerk of the Orphan's court for services rendered the guardian, not allowed against the ward. *Ib.* 169-70
- 8 Guardians shall not be allowed accounts against his ward to effect the capital of the infant—the income may be anticipated, and in extraordinary cases part of the capital appropriated by an order from the chancellor: not otherwise. *Ib.* 170
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10 One who marries an administratrix becomes bound to perform all the duties, and does not escape from his liability for neglect by her death. *Ib.*

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7 The distributees being infants, and having resided with their mother, the administratrix, no interest on their distributive shares allowed. *Chaplin &c. vs Simons' heirs*, 340

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- 1 On a plea of *liberum tenementum* to a declaration of one count,

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2 An assignment of a deed of conveyance by endorsement, made to secure a debt, gives a lien in equity. *Ashcraft vs Brownfield &c.* 128

3 Fair purchaser, at sheriff's sale, under a contract with the defendant that he may redeem, holds as in mortgage, and another creditor may maintain his bill to redeem, or have a sale and appropriation of the proceeds.— *Yoder &c. vs Standiford &c.* 480

4 All interested must be before the court in a bill to foreclose. *Maderas vs Callett,* 476

5 Mode of foreclosing the equity of redemption, and effecting a sale of mortgaged estate. *January vs January. Lyle & Steele,* 543
Durrett &c. vs Whiting &c. 548

6 Stipulations of the parties as to manner of the sale of the prop-

erty is a part of the law of the case, and not repenale as to them, by the legislature. See *Constitutional Law*. 588-9

7 Effect of the mortgagor remaining in possession. *Yoder &c. vs Standiford &c.* 488

8 Where the chancellor has no jurisdiction of the original demand, he can only order a sale of the mortgaged estate; and the creditor must go to law for any balance that may remain.— *Pool vs Young*. 590

9 In cases to enforce a lien for the purchase money, the chancellor has original jurisdiction. *Id.* 590

Mortgagor and Mortgagee.

1 Purchaser of a slave from the mortgagor, without actual notice of the deed, though on record, holding the property as his own for five years, is protected by the statute against both the action at law and bill in equity, of the mortgagee. *Young &c. vs Wiseman*, 271-2

2 It seems the mortgagor does not, by the tender of the mortgage money, acquire the right of recaption of the goods in mortgagee's possession, but must appeal to equity. *Boone vs Rains* 385

3 When the mortgagee brings his bill to foreclose the equity of redemption, he must make all interested in the estate parties.— *Madeiras vs Catlett*, 476

4 Mortgagor's demanding more than is due, does not effect his right to recover the costs of a suit to foreclose the equity of redemption, and sell the estate. *Davis &c. vs Phelps*. 636

5 Mortgagee cannot be compelled to accept a replevin bond in lieu of his lien on the land. *Id.* 637

6 Assignee and assignor's mortgagee have each but equities, which rank according to seniority.— *Madeiras vs Catlett*, 477

Motions.

1 Motion to quash a faulty replevin bond, must be made at the term next succeeding the return day of the first execution issued on it. *Hopkins vs Chambers*, 200

2 Query, whether objections to a replevin bond apparent, in the record, but different from the grounds specified in the notice of the motion to quash, may be relied on in the court of appeals. *Id.* 259

3 This remedy given by statute, for one surety against another for contribution, does not extend to the heirs; the motion is maintainable only against the executor or administrator. *Lansdale's adm'r. vs Cox*, 404

4 This was the construction of the like statute of Virginia. *Id.* 405

5 Against constables for failing to return executions, are barred by two years. *Harris vs Smith*, 311

6 Limitation of the motions against sheriff is computed up to the service of the notice. *Gore vs Hedges*, 321

7 Motion against the sheriff and his sureties for failing to account for militia fines or county levy cannot be maintained jointly against him and sureties, but may be against him or them. *Wood &c. vs Sayre &c.* 645

Motives.

1 Defendant's motives, proper to be considered by the jury, in assessing damages, in an action for a nuisance. *Tate vs Parrish*, 327

Negotiable Notes.

See *Powers of Attorney*.

New Trial.

- 1 Where a suit, by or against numbers, is managed by one, which is the better course, his affidavit of facts and of surprise, on a motion for a new trial, is sufficient without the others.—*South's heirs vs Thomas' heirs*, 96
- 2 Surprise; by death of witness. *Ib.* 61
- 3 Absence of party in consequence of being summoned as a witness in another court. *Ib.* 61
- 4 Affidavit for a new trial, because of the absence of the party and his witness, must state the fact witness would prove. *Ib.* 61
- 5 Where the jury assess damages not warranted by the allegations of the declaration, the court ought, *ex officio*, to set it aside; and if it be not done, this court will reverse the judgment and direct it. *Stewart vs Tevis' ex'or.* 109-10
- 6 New trial, moved on the ground that the verdict was against the evidence, overruled below, awarded here. *Price vs Wood*, 223
- 7 New trial awarded, against the decision of the circuit court, on the ground of surprise by the early trial of the cause, before defendant's arrival at court, and the absence of the witnesses.—*Price vs Ford*, 399
- 8 That there were less or more than twelve jurors is a ground for new trial. *Ross vs Neal*, 408

Non-Assumpsit.

This plea does not put in issue and require the plaintiff to prove his
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own existence, *Taylor vs Bank of Illinois*, 584

Non-Residents.

Suit against them. See *Absent Defendants in Chancery*.

- 1 Statute requiring of them surety for costs applies to writs of error in this court. *Hopkins vs Chambers*, 254
- 2 If the bond be not given in time the writ may be abated by plea. *Ib.* 255
- 3 Tender of a bond for costs will not avail after plea in abatement. *Ib.* 255
- 4 Where a motion is made to dismiss for the lack of security for costs, a bond may be filed and the suit saved. *Ib.* 255

Notary Public.

His *Protest*. See that head. 557-9

Notice.

See *Processioners of land*, 11, 12, 363

— *Executors and Administrators*. 414

- 1 Of motions in the County court for the establishment of ferries, when required. See *Ferries*. 312-13
- 2 Error in the year (1822 for 1824) in the date of a notice given the sheriff of a motion against him, corrected by the statement of the time the court would be held at which the motion would be made; and the notice held sufficient. *Gore vs Hedges*, 520

Notice of Fraud.

- 1 Husband's notice, before his marriage, of the wife's convey-
4 P.

ance of her estate, in fraud of his marital rights, is no objection to his right to the property.—
Hobbs vs Blandford,

473

2 What sufficient notice. *Nantz &c. vs McPherson,*

599

Novation.

1 Between principal and obligee, discharges surety. *Brown vs Wright,*
Robinson vs Offutt &c.

398

541

2 In such case, the new contract must be such, that the obligee ought to be compelled to rely on it, and not resort to the surety. *Brown &c. vs Wright,*

399

Novel Assignment.

1 An original count identifying a close, or a novel assignment, thus fixing the close, is the only mode of encountering the defendant's plea of *liberum tenementum*, where he has title to even one parcel of land in the county. *Tribble vs Frame,*

532

2 Numerous general counts will not answer the purpose of a novel assignment. *Ib.*

532

3 Defendant may plead to a novel assignment as to an original declaration, and plaintiff may make a second novel assignment. *Ib.*

533

Nuisance.

1 If I abate a private nuisance, I cannot afterwards maintain an *assise* of nuisance: otherwise of case: I maintain this action for the damages sustained. *Tate vs Parrish,*

327-8

2 Where a person is entitled to the use of the water of a spring on his neighbor's ground, it is a nuisance against him to pollute the waters. *Ib.*

328

Nul teil Record.

Variance between the sum demanded in debt on a judgment, and the amount of the judgment sued on in consequence of an error in the taxation of costs is not fatal, but the proper sum may be recovered. *Snoddy vs Maupin,*

52

Nuncupative Wills.

See Wills.

629-30

Obligations.

A note in these words: "I promise to pay S. O. \$114," signed: "For B. A. W. B. A." is not an obligation on B. A. but on W. B. A. *Offutt vs Ayres,*

356

Obligee and Surety.

A novation between the principal and creditor, whereby time is given, to the prejudice of the surety, discharges him. *Brown &c. vs Wright,*

398

Occupying Claimants.

Cases at Common Law.

1 *Bona fide* occupants only, are entitled to compensation for improvements by the common law. *Harrison's devisees vs Fleming,*

538

2 Devisees who settle and improve land, the testator had given his obligation to convey, with full knowledge of the claim, shall not be allowed compensation for their improvement. *Ib.*

538

Cases under the Statute.

3 If the unsuccessful defendant in ejectment, after having commissioners appointed under the occupant laws, fail to cause them to act and report, the plaintiff may, after the proper rule, have

- an order for the writ of possession. *Bodley vs Hord*, 322
- 4 Agreement between the parties relied on against the rule, and motion for the writ of *habere facias possessionem*, held under the circumstances of the case, inapplicable, and not sufficient cause against the rule. *Ib.* 322
- Onus Probandi.
- See *Indorsement of credits*. 343
- Orders of Publication.
- See Publication Orders: *passim*.
- Parent and Child.
- 1 Parents required to maintain their children without appropriating the principal of the children's own estate: except the circumstances of the parents are inadequate. *Chaplin and Moore &c.* 173
- 2 In trespass by the parent for the battery of the child, the jury may regard, when in assessing damages, the injury to the feelings of the parties, and character of the family. *Trimble &c. vs Spiller*, 395
- Parol Evidence.
- 1 Admissible to make a mortgage to secure an usurious loan out of a formal sale. *Lindley vs Sharp &c.* 252
- 2 Where admissible, and with what effect, to supply an omission in a will. See *Wills*. 627-31
- Parties to Actions at Law.
- See Obligations. 356
- Judgments. 449
- Parties in this Court.
- Where the complainant appeals from a decree dismissing a bill, none are parties here but those who were parties to the decree below, however the orders of this court in the cause may be entitled. *Lyle vs Bradford*, 113-14
- Parties in Chancery.
- 1 Surviving devisee of lands in trust, must unite the heirs or devisees with him in a bill to recover on the junior entry. *Sanders' heirs vs Morrison's ex'or.* 54-6
- See Trusts.
- *Jus accrescendi*.
- 2 Naming a person a defendant in the bill does not make him a party unless he appear, or is served with a process. *Lyle vs Bradford*, 113
- 3 He for whose use the action at law was prosecuted, is a necessary party to a bill by defendant for a set off. *Triplett & Turner vs Cox*, 191
- 4 Personal representative is the proper party to set aside a conveyance for personality. *Pringle & Dawson*, 208
- 5 Proper parties not being before the court; the merits not touched. *Ib.* 208
- 6 In a bill for distribution, the distributees ought to be parties.—*Wilkinson vs Ferrin* 215
- 7 The course of this court when the parties were not before the circuit court. See *Practice in this Court*, 215-6
- 8 Executor or administrator of the widow or other distributee, who died before receiving her distributive share, must be made a party to a bill for distribution.—*Wilkinson vs Ferrin*, 217

9 Assignor out of the state is not a necessary party to a bill to set off, against the judgment recovered by assignee, the damages obligor suffered by breach of assignor's obligation, received as the consideration of the note recovered upon. See *Set off in Equity*, 345-6

10 It is not necessary, in a bill by the principal defendant in a judgment at law for injunction, that the surety be made a party. *Bentley vs Gregory &c.* 365

11 One who appears in this court is considered before the Circuit court on the return of the cause. *Ib.* 369

12 Assignor not a necessary party to assignee's bill for specific performance. *Kenedy vs Davis' devisees, &c.* 375

13 In a bill to foreclose, all persons interested in the mortgaged premises should be made parties. *Madeiras vs Catlett,* 476

14 Cross bill cannot be taken for confessed against one of the original complainants not named as party to the cross bill. *Ib.* 477

15 In a bill by the assignee of one styling himself the administrator of the heir and executor and devisee of the obligee, the representatives of the obligee are necessary parties. *Ib.* 477

16 Assignee of the legacy to the wife, assigned by the husband, cannot recover without making the wife a party to the bill: that she may be provided for by the court. *Thomas &c. vs Kelsoe,* 523

Partition.

Slaves held in coparcenary may be sold by the order of the chancellor, where partition cannot be made; but the sale must be decreed by the court, not left with the commissioners to divide or

sell, as they may judge expedient. *Irvia vs Divine,* 248

Partners.

Acts of one partner in a purchase at sheriff's sale, effected by fraud, may be imputed to all. See *Sheriff's Sales,* 617

Patents for Land.

1 Grant to H. S. assignee T. B. assignee, &c. &c. issued on a survey and entry, each to hold in proportion to their respective quantities in the warrants: if it be shown S. had nothing in the warrant, nothing passed to him by the grant. *Bowlin and wife vs Pollock,* 31-2

2 It seems the estoppel to patentees in such case, to deny that one of them had some interest, can have no effect in a controversy between him and his vendee about the title. *Ib.* 32

3 Act of '92 vested the title in those who were heirs or devisees at the date of the enactment, and not at the time of the patentee's death. *Ib.* 40

4 Death of the grantee before the entry does not effect the operation of the grant under the act of '92 for the benefit of the heirs and devisees. *Ib.* 40

5 Where the patent is to several, to be held in proportion to their shares in the original warrants, parol evidence of the interest of the parties in the warrants and of a parol assignment before '87, is competent. *Ib.* 45

6 Recital in two grants that the surveys had been made on warrants of the same number, is not evidence the warrant had been twice used. *Woodson vs Buford,* 417-8

Paymaster.

Hemay, as relator, maintain an action in the name of the Commonwealth, against the regimental collector on his bond. *Commonwealth vs Harrison vs Pearce's ex'or.*

320

Payment.

Lapse of twenty years and less with circumstances, sufficient evidence of payment. *Herndon's ex'or. vs Bartlett's ex'or.*

450

See Lapse of Time.

450

Penal Actions.

Limitation may be relied on in these actions, under the general issue. *Estill &c. vs Fox,*

553

See Gaming.

553

Petition and Summons.

Not maintainable on a covenant for money and other matters; even to recover the money, only. See *Covenants.*

224-5

Petition for Rehearing.

Sanders' heirs vs Morrison's ex'ors.

57

Performance of Covenants.

Where the produce delivered to discharge a covenant is *believed* by the parties to be sufficient, and so *accepted*, the contract is legally discharged, it seems.—*Robinson vs Offutt &c.*

541

Pleading in General.

See *Trespass.*

111

1 Where after a demurrer to a dec-

laration is sustained, the plaintiff files a new count and the defendant pleads the general issue, the original declaration is out of the question. *Sanders vs Vance,*

209

2 In *abatement*, for the lack of bond for the costs, required of non-residents. See *Abatement.*

855-6

Pleading by Plaintiff.

1 Declaration in debt for the detention of \$218, repeated in several counts, is a case for but the \$218, and not within the jurisdiction of the General Court.—*Grant vs Tams & Co,*

220

2 In actions on bonds with collateral conditions, the plaintiff shall assign the breach and a jury shall assess the damages. *McGuire vs Trimble &c.*

121-2

3 Declaration in ejectment on the joint demise of the lessors cannot be maintained without proving title in all. *Smith vs Mahan &c.*

230

4 In a declaration on a covenant to convey land *on request*, the allegation of a special request is material, and may be traversed by plea. *Gibbs & Hardin vs Stone,*

303

5 In a declaration for a malicious prosecution the clause, "without any reasonable or probable cause," or its equivalent, is indispensable. *Maddox vs McGinnis,*

371

5 "Falsely and maliciously," will not supply the lack of the words "without any reasonable or probable cause." *Ib.*

372

7 In trespass *quare clausum fregit*, the plaintiff must identify the close in his declaration by a novel assignment, or the defendant may defeat him under the plea,

of *liberum tenementum*, by proving title to any ground in the county: however numerous may be the plaintiff's counts. *Tribble vs Frame*,

530-3

Pleading by Defendant.

In Abatement.

- 1 Pleas for the lack of bonds for costs must be filed in this court at the first term to which the process is returned fully executed. *Hopkins vs Chambers*,

256

In Bar.

- 2 In penal actions the limitation may be relied upon under the general issue. *Estill &c. vs Fox*,

553

- 3 In an action on an injunction bond against an executor wherein he was bound in his fiduciary character, *plene administravit* is good. *Hopkins adm'r. vs Morgan*,

5-6

- 4 It does not necessarily follow that a promissory note, with an agreement under written by payor, to "pay fifteen per cent on the above till paid" was given for a usurious loan: hence, a demurrer to a declaration on such an instrument, with the underwriting taken as a part thereof, will not avail. *Bush's adm'r. vs Bush*,

53-4

- 5 The usury must be pleaded.—*Ib.*

53-4

- 6 Plea of probable cause must set out the facts: from which the court judge whether there was reasonable and probable cause for the arrest. *Legrand vs Page*,

401

- 7 If part of the defendants in an action for malicious prosecution, fail to plead, judgment must go against them, notwithstanding

the sufficient plea of the others. *Ib.*

401

- 8 Where two pleas are offered of the same effect, the court may reject one as surplusage. *Ross vs Neal*,

407

- 9 Plea to the consideration in part is insufficient. *Forean vs Brown*,

412

- 10 In trespass *quare clauum fregit*, the defendant may plead *liberum tenementum* to all the counts, however numerous, and if plaintiff do not novel assign, he will succeed, on proof of title to any one parcel of land in the county. *Tribble vs Frame*,

530-3

- 11 Defendant pleads to a new assignment as to the original declaration, and plaintiff may make a second novel assignment. *Ib.*

533

- 12 Plea, in action *qui tam*, that the defendants were not in debt to the plaintiff, within three months before the action commenced, is nought: defendants could not have been indebted to the plaintiff before the action commenced. *Estill &c. vs Fox*,

552

- 13 An agreement signed by plaintiff's attorney; in covenant, after plea of covenants performed, that the special matter which could be legally specially pleaded, may be given in evidence, entitles the defendant to rely on the non-performance of a condition precedent. *Peebles vs Porter & Co.*,

609

- 14 Ministerial officers may justify under the warrant issued by competent judicial authority, not void on its face: otherwise where the officer issuing the warrant has not judicial power.—*Jarman vs Patterson*,

650

Pleading in Chancery.

See Exhibits.

43-4

- 1 It is sufficient, in a bill to be re-

- lied against a bond for lawful money given for the nominal amount of depreciated notes, to allege the borrowing and lending, without averring the transaction was usurious: the court will apply the name and the law. *Freeman &c. vs Brown*, 263
- 2 Where the defendant alleges a fact which must necessarily be within complainant's knowledge, and calls on him by interrogatory to answer to it, and complainant evades it in his response, the fact shall be considered admitted, and cannot be disproved by evidence. *Hutchinson's adm'r. & heirs vs Sinclair*, 293-4
- 3 That such fact had been denied by the complainant in his bill, and his bill framed on that ground, does not alter the case—he must answer on oath. *Ib.* 294
- 4 In the suit of alienor against administrator, widow, heirs and purchasers of alienee, to subject the land for the purchase money, the effect of the evasion by complainant of an allegation and interrogatories put by administrator, is not diminished by administrator's refusal to prosecute in this court, to reverse the decree against himself and others. *Ib.* 295
- 5 Answer of an usurer held to be evasive, and the matter alleged, taken for true. *Sallee vs Duncan*, 383
- 6 Construction of the averment of the bill. *Thomas &c. vs Kelsoe*, 523
- Possession.
- Of Slaves.
- 1 Father's possession of his infant child's property as natural guardian, does not subject it to his creditors, nor make his sale of it effectual against the child.—*Forsyth vs Kreakbaum*, 99
- 2 Where a slave is delivered to the father of the infant donee, "or the child, the possession *does* follow the gift," as required by the statute. *Ib.* 100
- Of Land.
- 3 Its manner is proved by the declarations of the occupant at the time of his entry: as part the *res gesta*. *Smith vs Morrow*, 236
- 4 Proof that one party had failed to list the land for taxation, is no evidence he was not in possession. *Ib.* 239-40
- 5 If the original settlement were outside the elder patent, and afterwards the improvements extended within the elder patent, the possession of the interference commenced with that extension of the improvements within the elder grant. *Ib.* 239-40
- 6 Settlement of the son-in-law of the former patentee within the interference between his patent and an elder grant unoccupied, under a promise of a gift of a certain number of acres, but not demarked, gives the possession to the extent of the former patent. *Ib.* 239
- 7 Exception of the growing crop by the sheriff in executing and return of a *habere facias*, is repugnant and nought. Plaintiff in the writ obtains possession of crop and all. *Foster vs Fletcher*, 536
- 8 One person cannot be in the possession of the land and another of the corn growing on it. *Ib.* 536
- 9 Plaintiff must have possession to maintain trespass. *Ib.* 536
- Powers of Attorney.
- Power to an attorney to execute promissory notes for discount at

bank to a certain amount, no more saying, does not authorize the renewal of said notes.—
Ward vs Bank of Kentucky,

93

Practice in Actions at Law.

1 Where, after a demurrer is sustained to the declaration, the plaintiff files an additional count without the demurrer being withdrawn, and the defendant pleads not guilty, the plea applies only to the new count. *Sanders vs Vance,*

209

2 It seems that where a writing is produced by one party, on notice from the other, and after being read is filed with the clerk, and a new trial being awarded, the paper is afterwards improperly taken from the custody of the clerk, the court may compel its production. *Smith vs Morrow,*

234-5

3 But where, after the paper had been used in such case, the party who produced it takes it back without its being committed to the custody of the clerk, he cannot be compelled to reproduce it. *Ib.*

235

4 No party to the action can be compelled by a court of law to produce his papers to be given in evidence against himself. *Ib.*

236

5 But if he decline after due notice, the contents may be proved. *Ib.*

236

6 Party who appears in the Court of Appeals, will of course be before the Circuit on the return of the cause. *Bentley vs Gregory &c.*

369

7 When two pleas of the same effect are offered, the court may reject one as surplusage. *Ross vs Neal,*

407

8 Where it is agreed the special matter may be given in evidence

the plaintiff must prove the performance of a condition precedent. *Peebles vs Porter & Co.* 609-11

9 Selection of numerous parties to manage the preparation of a cause approved, and his affidavit held equal to that of all.—
See *New Trial,*

60-1

Practice in Chancery.

See Absent Defendant.

— Partition.

— Guardian and Ward.

1 In this court, when the proper parties were not before the circuit court. See *Practice in this court,*

215-8

2 Loss of exhibits may be supplied by a proof before the circuit court and an order to the proper effect. *Gentry &c. vs Hutchcraft,*

244-5

3 When possession is surrendered according to a decree and that decree is afterwards reversed, restitution ought to be awarded. *Castleman vs Combe &c.*

277-8

4 In such case, on the return of the cause to the circuit court, the chancellor ought to have the possession restored, and the matter of rents, &c. all settled as a part of the original cause—not send the parties to law to finish the chancery case. *Ib.*

278

5 Jury directed to assess damages, on a breach of a covenant, to be set off against a judgment.—
Aldridge vs Birney &c.

347

6 Proceedings in selling estate in mortgage or otherwise under a lien, to raise the money. *January vs January,*

543-4

7 When the chancellor sets aside a deed of conveyance for a creditor, he does not send the com-

plaintiff to law, to have a sale, but he orders the sale and completes the case. *Yoder &c. vs Standiford &c.*

481

8 In foreclosing mortgages, and enforcing liens.

548

9 Before referring a cause to a commissioner, the court ought to settle the principles on which he is to make up the account. *Kay vs Fowler &c.*

10 Bill not maintainable for a distribution in part of the assets. *Smith et ux vs Maxwell's heirs,*

602

11 Bill of the mortgagee to redeem, on his default in not paying the money, according to the interlocutory decree, may be dismissed. *Davis &c. vs Phelps,*

636

Practice in this Court.

1 Proper parties not being before the court, the merits not touched. *Milam &c. vs Thomason,*

325

2 Case of a bill by one claiming under a will not proved, but which if established, would show others were concerned, and necessary parties remanded, with leave to make new parties.—*Sanders' heirs vs Morrison,*

54-7

3 Where there is an appeal bond executed by the proper parties, in due time, the case is then an appeal in this court; but may on notice, be dismissed for the insufficiency of the bond. *Clinton &c. vs Phillips' adm'r.*

118-9

4 Damages and costs follow on such dismissal. *Ib.*

118-9

5 Rules of practice in this court, in the argument of cross appeals. *Chapline & Moore &c.*

187

6 When the proper parties are not before the court, this court will never decide the merits; except when an insuperable obstacle

to the complainant's relief is found, and his bill is dismissed, this court will on that ground affirm. *Wilkinson vs Perri's,* 215-16

7 Loss of process below may be supplied there and certified here, to obviate the error for which the judgment had been superseded. *Gentry &c. vs Hutchcraft,* 245

8 Writ of error may be abated by plea for the lack of the bond for costs required of the non-resident plaintiff. *Hopkins vs Chambers,* 255

9 Plea in such case must be filed at the term to which the process is returned executed. *Ib.* 256

10 Writs of error may be amended, by adding or striking out plaintiffs or defendants. *Castleman &c. vs Holmes, &c.* 592

11 Where the defendants in the court below have sued out three several writs of error, and the causes have been heard, the court will not inform them of the defect, and invite them to unite in one, and dismiss the other, but will dismiss both writs. *Ib.* 592

12 Contradiction in instructions of the court to the jury, is error. *Ib.* 227

Prescription.

In an action against my neighbour, for polluting the water of a spring rising in his land and running through mine, evidence that I and those under whom I have used the spring for twenty years, is competent, both to prove my right to the use of the spring, and to aggravate the damages for the injury to the water flowing into my ground. *Tate vs. Parrish.* 327

Principal and Agent.

Note in these words, "I promise to pay S. O. \$114," signed "for B. A.—W. B. A." is the note of W. B. A. and not of B. A. *Offutt vs Ayres*,

356 See *Evidence*.

Chief Justice Bibb's dissent.

357

See *Judgments*.

449

Principal and Surety.

1 In an action by principal against surety, for money made by sale of the goods of the surety under execution, purchased by defendant, it may be shown by defendant, that plaintiff had before sold the goods to another, who afterwards recovered of defendant's vendee. *Head's rep's. vs McDonald*,

204 See *Publication Orders*.

324-6

2 Surety not a necessary party to the bill of the principal for injunction against a judgment.—*Bentley vs Gregory*,

368

3 Surety cannot have a rescission without showing collusion between principal and obligee.—*See Rescission of Contracts*,

397

4 Cases between sureties and obligees. See *Sureties*,

241-2

5 Equity had anciently the exclusive jurisdiction of the cases of sureties against their principals: the jurisdiction is now concurrent. *January vs January &c.*

544

Printer's Certificates

1 Of *Publication Orders*. See that head.

324-5

2 Printer's certificate, after the appearance day for the absent defendant, stating the order had been published nine weeks, not saying when, is insufficient and

the decree void. *Travis' rep's. vs Richardson's heirs &c.*

658

Privies.

100

Probable Cause.

1 Plea of this matter must set out the facts, that the court may judge of their sufficiency to constitute a *probable cause*. *Levand vs Page*,

401

2 It may be given in evidence under the general issue. *Ross vs Neal*,

408

Process.

1 Loss of the process and sheriff's return may be supplied by oral proof made before the circuit court at a subsequent term, and there recorded, and thus a judgment upheld. *Gentry &c. vs Hutchcraft*,

244

2 If, pending the writ of error with supersedeas, the defendant in error make sufficient proof of the existence and loss of the process and sheriff's return, the lack of which was the only error, the judgment will be affirmed with damages and costs. *Ib.*

245

3 Publication of the order for the appearance of the absent defendant, must be certified, by—*quere*, whom? *Wilkinson vs Ferrin*,

216-17

Freeman vs Brown,

264

4 Proof of the endorsement of the acknowledgement of the service of a subpoena in chancery, must appear in the record. *South's and Hoy's heirs vs Carr*.

419

5 In ejectment the declaration must be filed at the term to

which the tenant is warned to appear, and the matter entered on record, or there will be no case in court. *Sliger &c. vs Grants*, 406

Processioning of Land.

- 1 Special commissioners, to be appointed by the act of 1796, on the party's motion, may take testimony, and go around the land, and re mark it: but their report is only of the testimony, and that is made to the clerk only, not to the court. *Miller vs Patrick &c.* 35.
- 2 Standing processioners appointed by that act, had no power to take testimony. *Ib.* 360
- 3 They could only procession. re mark and renew the lost boundaries of the land. *Ib.* 361
- 4 Their report had to be approved by the court, and recorded by its order. *Ib.* 360
- 5 Act of 1815, authorized special commissioners to be appointed on the motion of the party, and empowered them to perform all that could be done by both classes of commissioners authorized by the act of '96. *Ib.* 360
- 6 Their report of processioning and of the testimony directed to be made to the clerk, and not to the court. *Ib.* 361
- 7 Standing processioners, appointed by the act of '96, directed to be kept up, and to be governed by this act of 1815. *Ib.* 361
- 8 By this act of 1815, the standing processioners may take testimony, and to them and the special commissioners are given all the same powers. *Ib.* 361
- 9 Reports of the standing commissioners must be made to court, and then judicially passed upon: otherwise as to the

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10 When the standing processioners perform the duties required by both the acts, they make but one report, and that to the court, when it must be passed upon and ordered to record. *Ib.* 362

11 One who attends the commissioners, and cross examines the witnesses, and takes depositions on his part, cannot object for the lack of notice. *Ib.* 363

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- 4 Ninth section of the act of 1820, authorizing a replevin for twelve months, of executions issued on recognisances, does not apply to recognisances entered into after that enactment: but applies to prior cases. *Simpson &c. vs F. and M. Bank of Lexington,* 550

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- 2 Action of replevin is not confined to cases of distress, but is the remedy for any wrongful taking the property of the owner out of his possession. *Ib.* 428
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- 2 Purchaser in such case having got nothing and not having paid the purchase money, may resist the payment, and have a rescission. *Ib.* 34
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- 5 When the vendee recovers of vendor, for failing to convey, he must surrender possession, and cannot rely on an outstanding title. *Logan vs Steele's heirs,* 105
- 6 When the vendee comes for a rescission, after receiving a conveyance, he must shew the defect of title, and that he has no remedy at law. *Payne vs Cabell,* 202
- 7 After receiving a conveyance under the executory agreement, the vendee is presumed to have inspected and received the title papers. *Ib.* 20
- 8 Surety of the purchaser cannot, on the bill and prayer of himself only, obtain relief against his obligation on the ground of fraud in the sale, without showing his principal and vendor had combined to defraud him. *Brown &c. Wright,* 397
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- 1 Against bail cannot be maintained till after a *ca sa*, and that having been abolished, there is now no remedy. *Peteet vs Owsley,*
- 2 On a judgment in ejectment for a writ of *habere facias*, the term recovered in the premises, must be set forth. *Wood &c. vs Coghill,*
- 3 No writ of possession nor, *scire facias* to have such writ, can be maintained after the expiration of the term. *Ib.*

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- 1 Where one obligation forms the consideration of another, and one of the parties, without performing, removes from the state, having assigned off the obligation to him, the other party may be relieved in equity against a judgment recovered by the assignee. *Aldridge vs Birney &c.*
- 2 In the bill in such case, it is not necessary to make the original obligor, against whom the complainant sets up the obligation he relies on for set-off, a party: he may proceed without him, as in case the set-off had been pleaded at law. *Ib.*
- 3 One for whose use an action is prosecuted, is a necessary party to a bill by defendant, for a set-off against the judgment, and may show his assignment prior to complainant's demand, or repel complainant, for the usurious consideration of his claim, before the consideration of his assignment can be enquired into. *Triplett & Turner vs Cox,*
- 4 Set-off in equity allowed only when it appears there is some obstruction to the recovery of the demand at law, or there is an agreement to set-off, a connexion between the demands, or other circumstance to give the chancellor jurisdiction. *Trimble vs Taul,*
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2 One who purchases goods at sheriff's sale, and sells to another, from whom they are recovered by paramount title, becomes immediately entitled to his recovery, before satisfying his vendee: because his responsibility is fixed. *Head's rep's. vs McDonald*,

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4 Defendant in an execution is not responsible for not disclosing at the sale, diseases of his slaves, or other defect in the property exposed to sale; he is not vendor. *Hart vs Hampton*,

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5 Purchaser under a contract with defendant that he may redeem, holds in mortgage. See *Mortgages*.

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2 The *jus accrescendi* is destroyed in trust estates, as in others, by the statute. *Ib.* 86

3 Where land is devised in trust, to two executors, saying nothing of survivor, on the death of one of the executors, a moiety passes to his heirs or devisees. *Ib.* 56

Trusts and Trustees.

Where one to whom an obligation is assigned in trust for the payment of a smaller sum, agrees with the obligor he may pay another debt of assignor, and be credited for the amount, and it is done, the assignee cannot be subjected by a judgment creditor of the assignee by bill under the act of '21: the transaction is valid. *McDonald's adm'r. vs Donaldson*, 194

United States.

Act subjecting choses in action to the payment of debts does not apply to debts due by the state or the United States. *Divine vs Harvie*, 443

Usury.

1 It consists of the agreement for extraordinary interest on a loan, or for forbearance. *Bush's adm'r vs Bush*, 53-4

2 A note at the foot of an obligation to pay 15 per cent on the amount till paid does not necessarily make a case of usury. See *Pleading by Defendant*, 53-4

3 And assignee of a judgment may repel the defendant coming into equity for a set off, by alleging the usurious consideration of the debt set up in the bill. *Triplett and Turner vs Cox*, 191

4 Parol evidence is competent to prove a transaction in the form of an absolute sale, was a mortgage to secure a usurious loan. *Lindley vs Sharp &c.* 252

5 An advance of money to an applicant for a loan for his obligation to deliver slaves of a certain description in a certain time, worth more than the money, held to be a usurious loan. *Ib.* 252

6 It is sufficient to allege the fact to constitute the case of usury, without giving the name. *Freeman &c. vs Brown*, 263

See *Pleading in Chancery*.

— 5 Monroe. 475

7 Loan of depreciated bank notes, to be repaid at the nominal amount in specie, is usury, and the borrower is bound but for the value of the paper when loaned, with legal interest. — *Collins vs Seacoh*, 336
Burnham & Co. vs Gentrys 354

8 Confession of judgment for the amount of the obligation is no bar to relief in equity for the usurious interest in the transaction. *Ib.* 355

9 Answer of an usurer, held evasive, and relief directed for complainant. *Sillee vs Duncan*, 383

10 Device of conditional sale of the mortgaged property, to the lender to cover the usury, ineffectual. *Butt vs Bondurant*, 423

See *Mandates*. 424

11 Where the usurer has renewed his securities, after the passage of the act for his benefit, of February, 1819, he is entitled to recover principal and legal interest, and loses but the excessive interest. *Kay vs Fowler &c.* 596

12 Mode of calculation, and of ascertaining the sum due on an usurious transaction, of numerous advances, payments, renewals and compoundings. *Ib.* 596

Variance.

1 Between the costs recovered in the judgment sued, and the amount demanded, occasioned by the error of the clerk in the transaction, not fatal. *Snoddy vs Maupin*, 52

2 Between writ and declaration, is fatal on demurrer in abatement. *Christian Bank vs Greenfield*, 290

3 Between the grounds of a motion in the court below and those relied on here, and apparent in the record. See *Motions*, 259

Vender and Vendee.

See *Principal and Surety*. 204

— *Sheriff's Sales—passim*.

1 Declaration of vendor before his sale, evidence against vendee. *Forryth vs Kreakbaum*, 100

2 One who obtains possession un-

- der an executory contract cannot deny the title of his vendor. *Logan vs Steele's heirs*, 104
- 3V. Undee by executory contract, after recovering at law for vendor's failure to convey, must surrender the possession, and cannot protect him-self by an outstanding title. *Ib.* 105
- 4 Vendee in possession, whose vendor conveys to another in violation of his contract, is absolved, and may deny the title he entered under, and purchase and defend under any other claim. *Ib.* 105
- 5 Decree for a conveyance against vendor by executory contract, in the favor of another absolves the vendee from his obligation of *quasi* tenant. *Ib.* 106
- 6 Record of such a decree is competent evidence in an ejectment by vendor against vendee. *Ib.* 106
- 7 Vendee who accepts the title is presumed to have inspected the title and received the goods; and therefore, to resist the payment of the price, must prove the defect of the title, besides showing that he has no remedy at law. *Payne vs Cabell*, 202
- 8 Act prohibiting the sale of land in adverse possession, does not apply when the occupant holds in such manner that he is bound to surrender the possession to the vendee without questioning his title. *Castleman vs Combs &c.* 276
- 9 Vendee cannot set off against part of the purchase money the damages sustained for the retention of the land in possession by vendor subsequent to a recovery on the covenant to deliver the possession. *Burnham vs Oldham &c.* 653
- 10 But the judgment so recovered may be set off in equity, because of the connexion. *Ib.* 653
- 11 Payment of no part of the purchase money can be resisted on the grounds of the claim of vendor's wife to dower, after a conveyance obtained by suit in equity. *Ib.* 356
- 12 Possession by vendee, not of course a waiver of vendor's forfeiture of his contract by his failure to convey. *Tewis' rep's. vs Richardson's heirs &c.* 657
- 13 To make the plea of a *bona fide* purchase without notice available, the notice, before the whole of the purchase money was paid and conveyance received, must be positively denied. *Nantz &c. vs McPherson*, 599
- 14 Such information as would put a prudent man on the search for the truth, is sufficient notice.—*Ib.* 599
- Void and Voidable.**
- See *Infants*. 301
- Village Rights.**
- 1 Act of 1779, allowing village rights to land. *Sharp vs Trustees of Lexington*, 23-4
- See *Lexington*. 24
- 2 Minors in the families of the villagers were not entitled to the 400 acres village rights and 1000 acres pre-emption in the country. *Ib.* 24
- Verdict.**
- Where the jury assess damages not warranted by the allegations of the declaration, the court ought *ex officio*, to set it aside. *Stewart vs Tewis' ex'ors.* 109

Warranty.

In sales of goods.

See Sheriff's Sales.

— Principal and Surety. }

1 Deed of conveyance, with warranty, made by a commissioner under a decree, passes all the titles the vendor may afterwards acquire *Logan vs Steele's heirs*, 108-9

2 Where the deed purports to convey all the estate, the covenant of warranty estops the grantor from asserting an after acquired interest in the land. *Smith vs Mahan &c.* 229-30

Query, of the effect, in case of eviction, of the warranty in a conveyance on a certain condition, and of a warranty in a reconveyance by the grantor back to the grantee, on greater consideration. *Kennedy vs Davis' devisees &c.*

Water Courses.

See Nuisances.

Widow.

1 Her *quarantine*, by our statute, extends to the mansion house and whole plantation, until her dower is assigned. *Chapline &c. vs Simmons' heirs*, 338

2 She is entitled to the use of the mansion house, and farm attached, until dower is assigned, whether she resides there or not. *White &c. vs Clarke*, 641

Wills.

See Devises, *passim*.

1 Whatever may descend may be

now devised. *Bowlin et ex vs Pollock*, 31

2 Last wills cannot be successfully assailed in equity, after the lapse of seven years from the probate: unless the complainants are under some disability. *McMillin vs McMillin*, 564

3 Evidence that the testatrix directed the writer of her will to insert a clause devising the residue of her estate to the complainant, which he omitted by mistake, but which she always believed was there, ineffectual. *Webb's heirs vs Webb*, 627

4 Lack of proof of the execution of the prior will held fatal against its effect here. *Ib.* 628

5 Parol evidence is not admissible to supply a clause in a will, devising real estate, omitted by mistake. *Ib.* 629

6 Statute in relation to nuncupative wills. *Ib.* 629

7 Statute of wills, frauds and perjuries. *Ib.* 631

8 Parol evidence has been admitted to control the provisions of wills, in cases of fraud. *Ib.* 630

9 To supply a clause in a will bequeathing personal estate, the bequest ought to be proved as a nuncupative will. *Ib.* 630

See Fees of Clerks. 20-1

Witnesses.

1 Slaves not competent witnesses, except for or against negroes and mulattos: hence their declarations as such are not competent evidence against others. *Tuney vs Knox*, 91

2 Witness who becomes interested in the matter after his

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attestation, cannot withhold his testimony. *Price vs Wood*, 223

Writ.

- 1 Variance between writ and declaration, is not aid by any statute. *Christian Bank vs Greenfield*, 290
- 2 In case of a decree in one suit, against a number of defendants, directing them severally to pay a certain sum each, and ordering them all jointly to pay the costs, the writ of error must be joint by all the defendants: one cannot maintain it. *Castleman &c. vs Holmes &c.* 592
- 3 Precedents of writs, evidence of the law. *Wood &c. vs Coghill*, 601

Writings.

- 1 Produced on the trial by one party on notice from the other are presumed genuine. See *Evidence*. 137
- 2 Their execution may be proved by circumstances. *Stevenson &c. vs Dunlap &c.* 137
- 3 When produced on a trial by one party, on notice from the other, how then disposed of, and afterwards obtained or their contents shown. See *Practice in Actions at Law*. 234-6
- 4 Existence and loss of the affidavit, on which a dedimus issued to take the deposition of a non-resident, may be proved by the clerk, and thus its place supplied. *Taylor vs Bank of Illinois*. 577

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REPORTS

OF

THE DECISIONS OF

THE SUPREME COURT OF KENTUCKY.

- 1 **HUGHES' REPORTS.** I VOL. This, book by James Hughes, Esq. Counselor at law, contains the cases determined by the Supreme Court for the *District* of Kentucky, before the establishment of the state, and by the Court of Appeals of Kentucky, from its establishment, to the March term, 1801, inclusive, in which the titles of land were in dispute.
- 2 **PRINTED DECISIONS, OR, SNEED'S REPORTS.** This book, labeled and cited by these titles, contains cases determined in the Court of Appeals of Kentucky, from the first day of March, 1801, to the 18th day of January, 1805, inclusive, published by Achilles Sneed, Esq., clerk of the court, without note or index.
- 3 **HARDIN'S REPORTS.** I VOL. By Martin D. Hardin, Esq., Counsellor at law, containing the cases at Common law and Chancery, determined in the Court of Appeals, from Spring Term, 1805, to Spring Term, 1808, inclusive.
- 7 **BIBB'S REPORTS.** IV VOLS. These volumes, by George M. Bibb, Esq., late Chief Justice of Kentucky, appointed the Reporter of the decisions of the Court of Appeals, according to an act of the General Assembly, of February, 1815, contain the cases determined from the Fall Term, 1808, to the Spring Term, 1817, inclusive.
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- 16 **LITTELL'S SELECTED CASES.** I VOL. This book contains the cases selected from the decisions of the Court of Appeals, which had not been published from the Fall Term, 1795, to the Fall Term, 1821, inclusive.
- 23 **MONROE'S REPORTS.** VII VOLS. By Thomas B. Monroe, Counsellor at law, "Reporter of the decisions of the Court of Appeals," appointed according to an act of the General Assembly, at the session of 1824, by the Governor, with the concurrence of the Senate. These volumes contain the cases determined from the Spring Term, 1824, to the end of the year, 1828, when an entire change of the Judges of the Court of Appeals occurred.
- ☞ This Reporter, Thos. B. Monroe, accepted the appointment of Attorney of the United States for the Kentucky District, on the 12th day of October, 1830, whereby it was considered that according to the constitution of Kentucky, he vacated the office of Reporter, held under the state, and John J. Marshall, Esq., was appointed his successor.

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